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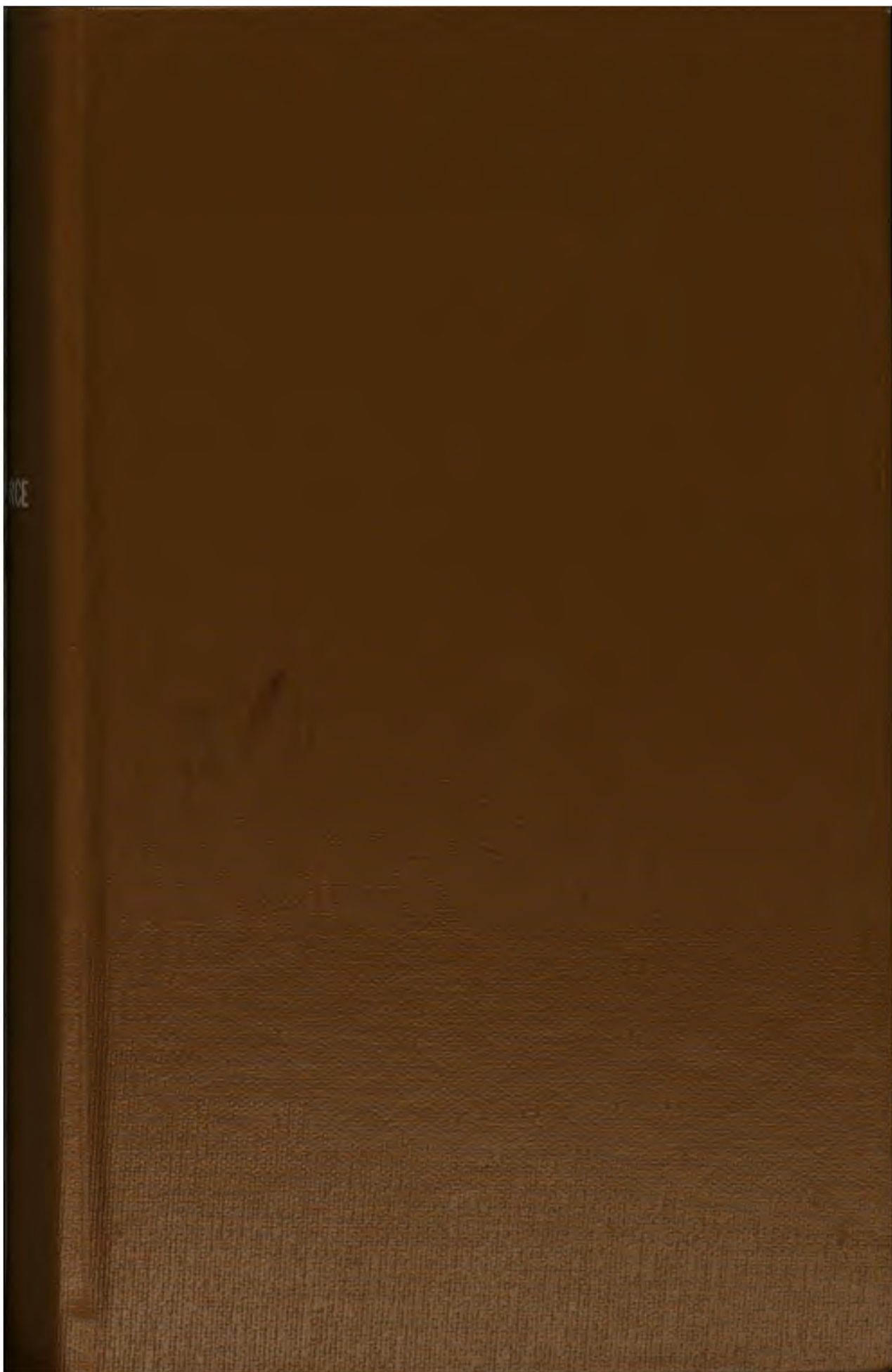
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COMMENTARIES
ON THE LAW OF
MARRIAGE AND DIVORCE,
OF
SEPARATIONS WITHOUT DIVORCE,
AND OF THE
EVIDENCE OF MARRIAGE IN ALL ISSUES;
EMBRACING ALSO
PLEADING, PRACTICE, AND EVIDENCE IN DIVORCE CAUSES,
WITH FORMS.

BY
JOEL PRENTISS BISHOP,
AUTHOR OF "COMMENTARIES ON THE CRIMINAL LAW."

VOL. II.
FOURTH EDITION.
BOSTON:
LITTLE, BROWN AND COMPANY
1864.

335236

Entered according to Act of Congress, in the year 1884, by

JOEL PRENTISS BISHOP,

In the Clerk's Office of the District Court of the District of Massachusetts.

WINTHROP PRESS, CAMBRIDGE:

ALLEN AND FARNHAM.

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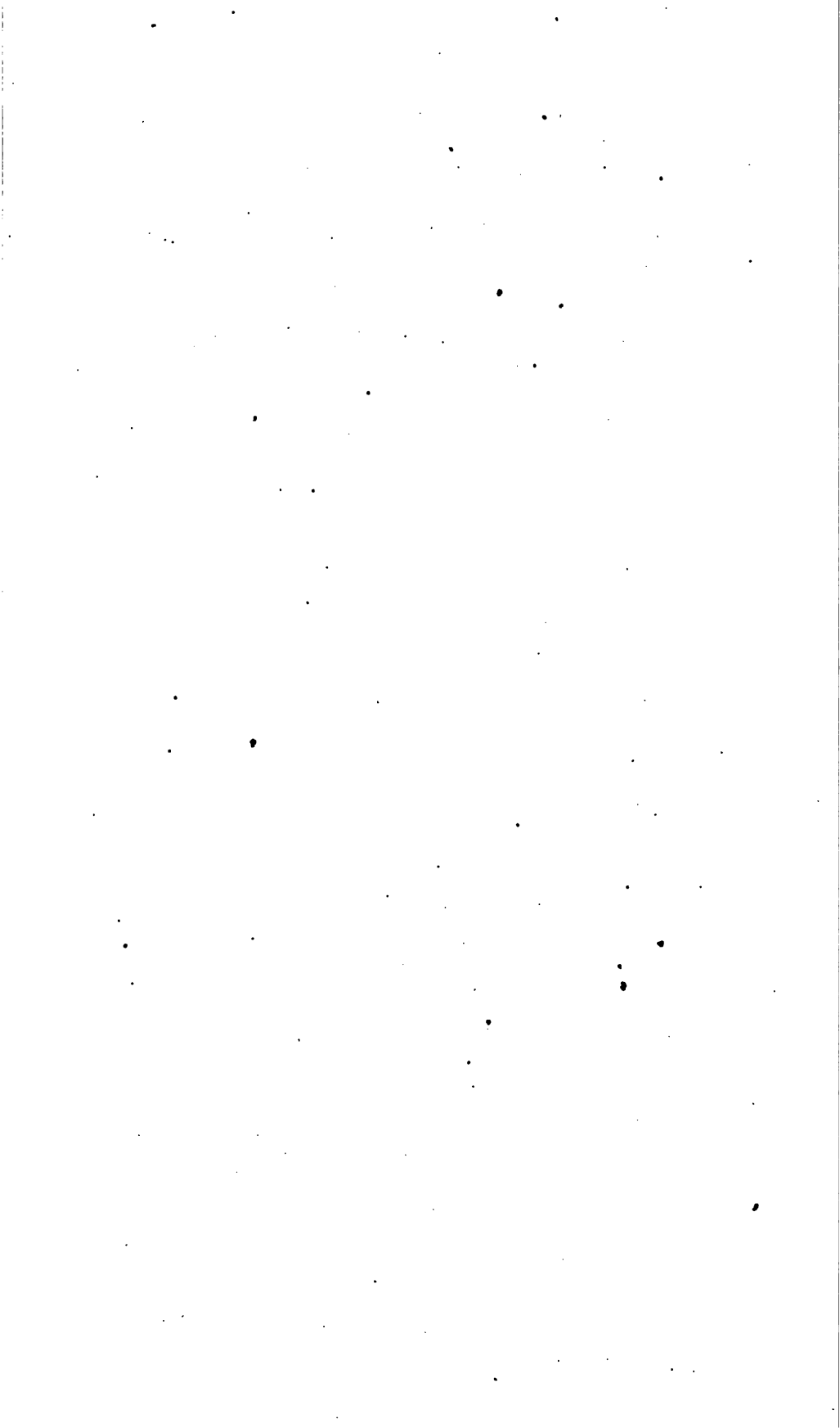
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BOOK I.

THE DEFENCES IN DIVORCE SUITS AND IN SUITS FOR DECLARING THE MARRIAGE NULL.

CHAPTER I.

PRELIMINARY OBSERVATIONS RESPECTING THE SEVERAL DEFENCES.

§ 1. THE defences to be considered in the present subdivision of our subject are those only which are of a general character. Such defences as pertain merely to particular causes of divorce or of nullity are brought under examination in other connections. If the defence, of the latter class, is one relating to the law in distinction from the procedure, it will be found in our discussion of the particular cause, embraced in the first volume. If it relates to the procedure, it will be found in its corresponding place in the present volume.

§ 2. The defences to be brought under review in the present series of chapters pertain, for the most part, to the divorce suit, not to the suit for nullity. Yet the defence of Lapse of Time and of Insincerity attaches itself as well to the latter class of suits as to the former. In divorce suits, moreover, the question whether there was a marriage valid in law or not, is, as we shall more particularly see in another place, always one of the issues presented by the plaintiff, to be con-

tested by the defendant if he likes; and, in such contestation, the same matter may be tried as when a suit is brought directly for nullity. This defensive matter, however, is not for consideration in the present connection. Involving the same questions which are discussed under the several titles embraced in our third book of the first volume, it will be found sufficiently stated there, as to the law; while, as to the procedure, it will be elucidated in its more appropriate places in the present volume.

§ 3. There are likewise various questions relating to the method of presenting the defences discussed in the present series of chapters, not to be entered upon here. Yet we shall in these chapters consider as well the evidence which establishes the defences, as the law. This mingling of law and evidence in the same chapter does not accord with the method pursued in other parts of these volumes, but it is convenient as applied in this particular instance. It would be satisfactory could we always so order the course of discussion upon legal subjects as to fail in no instance to cause the theoretical and practical, the inner beauty and the outward reality, to blend. But until those higher harmonies which poets dream of shall pervade each thing of use in this lower world of ours, men must be content to adapt themselves somewhat to circumstances; and even, if they are lawyers, to read, though they might be unwilling to write, law books wherein the practical unfoldings of doctrine shall not quite chime with the upper bells which summon archangels to their feasts of beauty. Happy would the writer be, if, in one legal treatise, he could present perfect beauty and perfect truth together, robed in the garments which celestials wear, just fitted to meet the peltings of our earthly hail and snow, and bearing the exact likeness to a judge on the bench, and a foreman of a jury rendering a verdict!

CHAPTER II.

CONNIVANCE.

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§ 4. We shall in the present chapter consider, in respect to this matter of connivance, I. The Law; II. The Distinction between the Law and the Evidence; III. The Evidence. The pleading and practice will come up for discussion in other parts of this volume.

I. *The Law.*

§ 5 [332]. Connivance is the corrupt consent of a party to the conduct in the other party whereof he afterward complains. It bars the right of divorce, because no injury was received; for what a man has consented to, he cannot say was an injury. "In that case," observes Lord Stowell, "the general rule of law comes in, that *volenti non fit injuria*, no injury has been done, and therefore there is nothing to redress."¹ While this defence is available in all divorce causes,

¹ *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360; *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 14; *Anichini v. Anichini*, 2 Curt. Ec. 210, 7 Eng. Ec. 85, 86; *Pierce v. Pierce*, 3 Pick. 299; *Reeves v. Reeves*, 2 Phillim. 125, 1 Eng. Ec. 208; *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Harris v. Harris*, 2 Hag. Ec. 376, 414, 2 Eng. Ec. 160, 178; *Clowes v. Clowes*, 9 Jur. 356; *Barker v. Barker*, 2 Add. Ec. 285, 2 Eng. Ec. 307; *Phillips v. Phillips*, 1 Robertson, 144.

those in which it has most frequently arisen, are suits for adultery.

§ 6 [333]. Evidently connivance is a thing of the intent, resting in the mind. It is a corrupt consenting. Errors or imprudences coming short of this, however fatal in their consequences, are not connivance. "Different men have different degrees of judgment, and judge differently; nor are we to judge by the event. A court of justice must look *quo animo* the step is taken."¹ But the connivance may be a passive permitting of the adultery or other misconduct, as well as an active procuring of its commission. If the mind consents, that is connivance.²

§ 7 [334]. A query was indeed suggested by Dr. Lushington, in 1829, whether, in a suit for divorce on the ground of adultery, something short of this concurrence of the will may not bar the plaintiff's remedy. His words were: "What degree of neglect, however culpable, short of an actual and voluntary exposure of the wife to the seduction of the adulterer, would be sufficient, in order to bar a suit for divorce by reason of adultery, is nowhere laid down, at least with that distinctness and precision which would furnish a safe guide for the court to act upon. The court certainly does not recollect any case of the kind; but it can conceive, that a case might arise of such wilful neglect, or rather exposure, as might, without proving actual connivance, possibly bar

¹ *Hoar v. Hoar*, 3 Hag. Ec. 137, 5 Eng. Ec. 51, 53, by Lord Stowell; *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130, 136.

² *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Rogers v. Rogers*, 3 Hag. Ec. 57, 59, 5 Eng. Ec. 13, 15; *Walker v. Walker*, cited 3 Hag. Ec. 59, 5 Eng. Ec. 15; *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21; 2 Greenl. Ev. § 51. And see the luminous judgment of Sir Herbert Jenner Fast, in *Phillips v. Phillips*, 10 Jur. 829, where this whole subject of connivance is discussed, and the authorities are cited and reviewed. The principle deduced by the court, as applicable to the case then under consideration, is, "that, where there is no corrupt intention proved on the part of the husband, he is not debarred from the remedy." See also s. c. decided in the court below, by Dr. Lushington, 1 Robertson, 144.

the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risks so great, as to render a deviation from the paths of chastity the most probable, if not the necessary, consequence. Under such circumstances perhaps, the court would not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences of his own conduct, where the adulterous connection arose from the society and temptations to which he had introduced his wife."¹ Yet the principle on which such a husband would be deemed responsible, if at all, in the case suggested, is doubtless that he must be presumed to have intended the natural consequences of his own conduct.² If one should ignorantly place his wife in circumstances of temptation, it would be contrary to the spirit of the authorities, contrary to justice also, to hold, that the mistake bars him of his remedy, on her voluntarily yielding to the temptation.³ This evidently is likewise the later opinion of this learned judge himself, as to what the law is, perhaps not as to what it should be.⁴

§ 8 [335]. The same learned judge, thirteen years after deciding the case from which the foregoing extract has been made, said: "If adultery is charged against a wife, if counter-adultery cannot be proved, nothing can bar a sentence for

¹ *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 178. And see *Barber v. Barber*, 14 Law Reporter, 375, a Connecticut case, in which similar language is employed by Church, C. J. In actions for criminal conversation, the doctrine of the common law is, that, if the husband consents to his wife's adultery, the consent bars his action; if he is only negligent, this goes merely in reduction of damages. *Duberley v. Gunning*, 4 T. R. 651, 657. See *Reeve Dom. Rel.* 64.

² "In all this I do not say, that the husband intended the ruin of his wife, and was looking for a divorce as the consequence; but, if the legal presumption be applied that every man is presumed to intend the legitimate consequence of his deliberate acts, such a conjecture is not unreasonable."³ In this case the plaintiff was held to be barred of his remedy. *Barber v. Barber*, *supra*. And see post, § 21; 1 Bishop Crim. Law, § 248, 513, 514.

³ See *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Hoar v. Hoar*, 3 Hag. Ec. 137, 5 Eng. Ec. 51; *Burgess v. Burgess*, 2 Hag. Con. 223, 4 Eng. Ec. 527.

⁴ Post, § 8; *Phillips v. Phillips*, 1 Robertson, 144.

separation but connivance on the part of the husband ; cruelty will not be a bar, neither will malicious desertion : although such conduct will have a tendency to cause the wife to commit adultery, it is clearly established that it is no defence to the husband's suit. Although I have some doubt as to the propriety of the doctrine on this point, I have felt myself compelled to act on it ; indeed I did act on it in a recent case of *Morgan v. Morgan*.”¹ And he therefore held, in a husband's suit for adultery, that a defensive charge of cruelty, not admissible in England on general principles,² was not rendered so by the averment of the cruelty having been inflicted to get rid of the wife, by driving her to the commission of adultery. But he added : “ There may by possibility be cases where cruelty on the part of the husband may directly lead up to the wife's adultery ; I say nothing upon such a case.”³

§ 9 [336]. When a husband suspects his wife of infidelity to his bed, he may watch her, and even leave opportunities open for her, in order to obtain proof of her guilt ; but, for this purpose, he must neither lay temptations in her way, nor provide the opportunities. “ It is true,” remarks Lord Stowell, “ a husband is not barred by a mere permission of opportunity for adultery ; nor is it every degree of inattention on his part which will deprive him of relief ; but it is one thing to permit, and another to invite ; he is perfectly at liberty to let the licentiousness of the wife take its full scope ; but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution.”⁴ If therefore a man

¹ *Morgan v. Morgan*, 2 Curt. Ec. 679, 686, 7 Eng. Ec. 258. And see post, § 19, 20.

² Post, § 80.

³ *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 381. And see the opinion of the same judge in *Phillips v. Phillips*, 1 Robertson, 144 ; s. c. in the Arches Court, 10 Jur. 829.

⁴ *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 25 ; *Pierce v. Pierce*, 3 Pick. 299 ; *Reeves v. Reeves*, 2 Phillim. 125, 1 Eng. Ec. 208 ; *Clowes v. Clowes*,

thus leads his wife into adultery, he cannot have a divorce from her because of her having followed.

§ 10 [337]. There is a doctrine going still further; namely, that, if a man connives at one act of adultery committed by his wife, he cannot have a divorce from her though afterward she commits other acts of adultery with the same or another *particeps criminis*. This doctrine, as a general one, is very just; still, in reason, it should not be carried to all lengths, because thus a man would be forever barred of all hope, though he should repent of his wrong, and strive to win his wife to repentance also. Where the woman undertakes to defend herself against her husband's suit for divorce, grounded on such her subsequent adultery, by relying on his connivance in a former instance, with a different person, she must prove the former adultery; since connivance in law attaches not on the one side, unless the legal guilt of adultery is incurred on the other, though *in foro conscientie* it may be otherwise.¹

§ 11 [338]. In an English case, decided by Sir William Wynne in 1795, it was held, that the husband proceeding against his wife for gross adultery committed five years after the parties had separated, resulting in the birth of children baptized in the husband's name, was not barred, though, before the separation, he had connived at adultery by her with persons other than the one with whom her later adultery was committed.² But when this husband brought his suit in the

9 Jur. 356; *Bray v. Bray*, 2 Halst. Ch. 628. Dr. Lushington says, that the expression of Lord Stowell, in the text, must be understood to mean no more than that a husband, suspecting his wife of adultery, is at liberty to remain quiet, and to watch her, for the purpose of detecting her adultery; but, if he is once in possession of a fact of adultery, and still continues his cohabitation, it proves, as Lord Stowell had also observed, connivance, collusion, and facility. *Phillips v. Phillips*, 1 Robertson, 144, 158.

¹ *Stone v. Stone*, 3 Notes Cas. 278, 306, 307, 1 Robertson, 99. There must be consent with knowledge of the adultery. *Phillips v. Phillips*, 1 Robertson, 144. And post, § 11.

² *Hodges v. Hodges*, 3 Hag. Ec. 118, 5 Eng. Ec. 42.

common law court against the adulterer for the criminal conversation, Lord Kenyon ruled, that "his having suffered such connections with other men was equally a bar to the action as if he had permitted the present defendant to be connected with her."¹ And Dr. Lushington, in a subsequent divorce case, permitted the wife to plead connivance, under similar circumstances, observing of the before-mentioned suit for divorce: "It is, to the best of my knowledge and belief, the only case which upholds that doctrine; and, although the case has been cited by judges for other purposes, it has never been relied upon for the main question, namely, that the husband may connive at the adultery of his wife with one man, and at a subsequent period obtain a divorce in these courts for her adultery with another. Such a doctrine, resting upon a single case, however high the authority, most unquestionably I will not follow. I have had occasion to make the observation before, that I never can think that a man who had been so forgetful of his own duties, moral and religious, toward his wife, and of all feelings of honor as a gentleman, as to connive at his own disgrace, by being a party to her adultery with one man, can come to a court of justice with clean hands, and seek a separation for the subsequent conduct of his wife, to whose guilt he had been, as it were, foster-father. So far as this principle is concerned, I have no hesitation, therefore, in saying, that I will not be deterred by the decision of *Hodges v. Hodges*, from allowing the wife in this case to plead facts sufficient in law to prove, if she can, that Mr. Stone did connive with Mr. H. during the cohabitation."² So, in a much earlier case, where the wife made no defence to the suit, Lord Stowell dismissed it, on the ground, that, though the adultery alleged was clearly proved, yet the husband was shown also to have connived at another adulterous act, nearly contemporaneously committed, with another person. "The Ecclesiastical Court," he said,

¹ *Hodges v. Windham*, Peake, 39.

² *Stone v. Stone*, 3 Notes Cas. 278, 282, 1 Robertson, 99. See remark of Sir John Nicholl, in *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 20.

“requires two things,—that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife; and, if he has relaxed with one man, he has no right to complain of another.”¹

§ 12 [338 a]. Plainly the views of Dr. Lushington and of Lord Stowell, as expressed in the extracts given in the last section, are correct in morals and in law, as general propositions, and as applied to the cases then before them. Yet few general propositions are found to be so exact, and at the same time so broad, as to meet even the legal justice, more especially therefore the moral and social justice, of every case possible to arise in the future.

II. *The Distinction between the Law and the Evidence.*

§ 13. We have no decisions laying down the rule whereby the law and the evidence are to be separated from one another in these cases, when the issue is tried before a jury, and the judge passes upon the law and the jury upon the evidence. But it is plain, that, as matter of legal principle, the judge is to instruct the jury to consider whether, in real truth, provided the pleadings are so drawn as fully to meet the case, the party accused of connivance desired the offence should be committed, either the particular offence or the corresponding offence with a person other than the present *particeps criminis*; and whether, so desiring, he did any act or spake any word to promote its commission, or, in short, in any way by will or conduct contributed to the result. Such general principles of law might also be presented to the attention of the jury, if the facts required, as that a party shall be presumed, in the absence of controlling proof, to intend any result which his own conduct is calculated to produce; and the like. What further, therefore, is to be said in this chapter will find place under the general sub-title of—

¹ *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27, 28.

III. *The Evidence.*

§ 14 [339]. Recollecting that connivance is in essence the corrupt intent of the mind, without which intent it cannot exist,¹ let us first notice a distinction between connivance and condonation, which latter leads to the same legal consequence. There may be condonation without blame, while connivance necessarily implies guilt; therefore to establish connivance, it requires evidence more grave and conclusive than to establish condonation.² The burden of proof is, of course, on the party setting up the connivance; and the testimony must be strongly inculpatory,³ admitting of no dispute.⁴ In the language of Sir John Nicholl, "it cannot readily be presumed that any husband would act so contrary to the general feelings of mankind, as to be a consentient party to his own dishonor."⁵ Yet a rule of evidence, similar to the familiar one that it is not necessary to prove adultery in time and place,⁶ applies here; namely, that a specific act of conniving at a specific act of adultery need not be shown, but general connivance is sufficient.⁷ Indeed this last proposition flows necessarily from the doctrine before discussed,⁸ that connivance at one act and with one man is legally equivalent to connivance at every subsequent act with all men.

§ 15 [340]. The proof of connivance, when especially of

¹ Ante, § 6.

² *Turton v. Turton*, 3 Hag. Ec. 338, 350, 5 Eng. Ec. 130, 136.

³ *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 121; *Phillips v. Phillips*, 1 Robertson, 144.

⁴ *Turton v. Turton*, *supra*; *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21; *Phillips v. Phillips*, 1 Robertson, 144, 156.

⁵ *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 16.

⁶ *Caton v. Caton*, 13 Jur. 431, 432.

⁷ *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28. But see *Phillips v. Phillips*, 1 Robertson, 144, 162.

⁸ Ante, § 10-12.

the merely consenting kind,¹ is seldom direct; but the facts, like others resting on circumstantial evidence, are established by a variety of attendant facts, often trifling in themselves, yet convincing in combination.² If the combined attendant facts are equivocal, not necessarily showing a guilty intent to connive, whatever other error or weakness they indicate, they are insufficient; for such intent must be proved, not left to conjecture.³ In the language of Sir Herbert Jenner Fust, also, "what amounts to proof of actual knowledge and concurrence is a question which depends upon the circumstances of each case; but, without intentional concurrence or corrupt connivance, there is no bar."⁴ So, in examining the authorities, the words of the courts should be considered as used in respect to the particular cases under discussion, else misapprehension will arise.⁵

§ 16 [341]. In deciding in one case, whether a husband had connived at his wife's adultery, as alleged by her in answer to his prayer for divorce, Dr. Lushington pursued the following order: 1st, What acts were done by the wife. 2d, What came to the knowledge of the husband. 3d, What might reasonably have come to his knowledge; or, in other words, supposing reason for inquiry existed, what might with ease have been discovered. 4th, What the husband did do, and what he did not do.⁶ This method was a good one in the particular case, and undoubtedly it will hereafter be found adapted to other cases. But no worn road of travel is laid through all the field of the future, to be pursued uniformly to the disregard of ways discernible in the particular instances.

¹ Ante, § 6.

² *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 15.

³ *Phillips v. Phillips*, 1 Robertson, 144, 157, 158. But see ante, § 7 and note.

⁴ *Phillips v. Phillips*, 10 Jur. 829, 832.

⁵ *Phillips v. Phillips*, 1 Robertson, 144, 156; Vol. I. § 63.

⁶ *Phillips v. Phillips*, 1 Robertson, 144; s. c. in Arches Court, 10 Jur. 829, 4 Notes Cas. 523; affirmed by Jud. Com. of Privy Council, June 29, 1847.

§ 17 [342]. To estimate properly the evidence tending to establish connivance, we must sometimes consider the relative situation and duties of husband and wife. The law imposes on the husband the obligation to watch over the morals of his wife; and protect her against associations which might expose to hazard her purity, or, by lowering her standard of virtue, prepare the way for the approaches of the seducer.¹ While, therefore, his want of attention to her selection of associates, to her morals, and her conduct in other respects, or even his introducing the paramour to her, is not of itself connivance, it may be strong, sometimes satisfactory, evidence of it.²

§ 18 [342]. But the wife is said not to be the guardian, to the same extent, of her husband; and, though connivance may be established against her, by circumstantial as well as by direct proof, yet it is not always inferred from facts which would be ample were the parties reversed.³ Therefore where the husband had committed adultery with his wife's sister,

¹ *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 177; *Hamerton v. Hamerton*, 2 Hag. Ec. 8, 4 Eng. Ec. 13, 15. In *Crewe v. Crewe*, 3 Hag. Ec. 137, 5 Eng. Ec. 45, 50, Lord Stowell said: "The general mode in which these parties lived together is extraordinary, and not unimportant. There was no formal separation, yet as much estrangement as can well consist with the marriage state. She is allowed to go to Bath, to Brighton, and to other public places, without the husband being there for more than a night or two; the court cannot compel the husband, even if he has no office nor profession that prevents him, to be constantly with his wife; but every man must observe, that this husband did not give his wife the benefit of his care. I do not say that the husband is to dog his wife at every step with sullen and gloomy suspicion; but the protection and comfort of his society are to be afforded to a person so closely connected with him, and in whose conduct his happiness, as well as her own, is involved." And see *Poynter Mar. & Div.* 228, 229.

² *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21; *Gilpin v. Gilpin*, 3 Hag. Ec. 150, 5 Eng. Ec. 58; *Moorson v. Moorson*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Stone v. Stone*, 3 Notes Cas. 278, 308, 309, 1 Robertson, 99, 101; *Michelson v. Michelson*, 3 Hag. Ec. 147, 5 Eng. Ec. 56; *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377; *Graves v. Graves*, 3 Curt. Ec. 235, 7 Eng. Ec. 425; and *Hoar v. Hoar*, 3 Hag. Ec. 137, 5 Eng. Ec. 51.

³ *Poynter Mar. & Div.* 231, and *Ruding v. Ruding*, *ib.* note; *Angle v. Angle*, 12 Jur. 525.

and it had come to the knowledge of the wife ; who, afterward, for particular reasons, permitted this sister to accompany her and her husband to India, and to live in the same house with them ; she was held, under the peculiar circumstances of the case, not barred of her remedy for his subsequent adultery with this sister. Though her conduct was deemed imprudent, it was thought not necessarily to proceed from an evil intent.¹ And Dr. Lushington once refused to infer connivance against the wife ; though, for the purposes of the decision, he assumed that she had voluntarily cohabited with her husband in harmony a year, and afterward had forbore to bring her suit for eight years, during all which time she had knowledge of the adultery,² — conduct abundantly sufficient to bar the husband, were the parties reversed.³

§ 19 [343]. Mere coolness by the husband, and his inattention to the comforts of the wife, seem not to be even admissible in evidence, as sustaining the charge against him of having connived at her adultery.⁴ And, observes Dr Lushington : “ I know of no authority for saying, that coarse and even brutal behavior, obscene and disgusting language, entire disregard of decorum, will *alone* constitute connivance. ‘Such conduct is indeed most degrading to a gentleman, and offensive to all good feeling ; but it does not *necessarily*, either *de facto*, or by intendment of law, prove that the husband acquiesced in his wife’s adultery. Even cruelty and desertion, though tending to induce the wife to disregard her own duties, are not connivance. Facts, to constitute connivance, must have a direct and necessary tendency to cause adultery to be committed or continued.”⁵ Thus where, in Connecticut, a husband instituted his suit for divorce by reason of his wife’s adultery, to which suit she set up in defence that the

¹ *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130. The court in this case intimated, that, even if connivance had been proved, the wife might not be barred thereby, because the adultery was incestuous.

² *Angle v. Angle*, *supra*.

³ See post, § 22.

⁴ *Moorsom v. Moorsom*, 3 Hag Ec. 87, 5 Eng. Ec. 28.

⁵ *Stone v. Stone*, 1 Robertson, 99, 101, 3 Notes Cas. 278, 308, 309.

adultery was committed, if at all, through an understanding between him and the *particeps criminis*, for the purpose of laying a foundation for the divorce; she was not permitted, in support of this allegation, to introduce testimony of his having for a considerable time treated her unkindly, and inflicted acts of cruelty; either, first, as proving the connivance; or, secondly, as repelling the presumption against it which arises from the marriage relation.¹

§ 20 [343]. Yet it is difficult to resist the conviction, that facts like the foregoing may, in a proper case, be admitted, when offered in connection with other facts; though, standing alone, they are so clearly insufficient as perhaps to be irrelevant. For example, while a husband may beat and abuse his wife, and not connive at her adultery; yet, if there are independent circumstances directly pointing to the connivance charged, the conclusion may be more easy if it is further shown, that he has lost his affection for her, and so is probably desirous of getting rid of her. Thus we shall see, in a subsequent chapter, that evidence of cruelty is admissible in proof of adultery; because a husband whose love for his wife has departed, is likely to seek unlawful pleasures. What effect cruelty may have as a recriminatory plea will be considered in its proper place.

§ 21 [344]. Obviously there can be no connivance at any act without some knowledge of its existence, or at least its proximate causes; unless indeed the case be one in which the party accused of the connivance has laid the train leading to the result, and is yet in ignorance whether the sought-for end has been reached. Therefore in examining the conduct of a husband on the question of his alleged connivance at his wife's adultery, we should in most cases consider, what notice of it he had, or what suspicion of behavior in her tending to it.² And Dr. Lushington went in one case

¹ Austin v. Austin, 10 Conn. 221.

² Hoar v. Hoar, 3 Hag. Ec. 137, 140, 5 Eng. Ec. 51, 53; Rogers v. Rogers, 3

so far as, after a review of the authorities, to say: "There must be knowledge, or presumed knowledge, of the adultery, or improper familiarities leading thereto; not finding any evidence of this description, I pronounce for the separation."¹ Thence it follows, that, if the parties were living separate at the time of the adultery committed, and no improper familiarities are shown to have taken place during their cohabitation, connivance will not be presumed, without the clearest possible evidence of intention and consent.² On the other hand, while the cohabitation continues, if the husband receives a caution concerning the conduct of his wife,³ or if he sees what a reasonable man could not see without alarm,⁴ or if he knows she has been guilty of antenuptial incontinence,⁵ or if he has himself seduced her before marriage,⁶ whereby he is put upon his guard respecting her weakness,—he is called upon to exercise a peculiar vigilance and care over her; and, if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the consequences. Yet this rule should be applied with due allowance for defective perception, dullness of capacity, overweening confidence, and the like.⁷

§ 22 [345]. So, while a man may forgive the adultery of his wife already committed,⁸ without thereby licensing her to commit future adulteries, yet too great a facility of condonation amounts to a general license, and to sufficient proof of

Hag. Ec. 57, 5 Eng. Ec. 13, 18, 19, 20; *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22; *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27; *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45; ante, § 16.

¹ *Phillips v. Phillips*, 1 Robertson, 144, 164.

² *Rogers v. Rogers*, 3 Hag. Ec. 57, 72, 5 Eng. Ec. 13, 20.

³ *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377.

⁴ *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 106, 5 Eng. Ec. 28, 37.

⁵ *Best v. Best*, 1 Add. Ec. 411; s. c. in Arches Court, cited *Poynter Mar. & Div.* 230, note; *Graves v. Graves*, 3 Curt. Ec. 235, 7 Eng. Ec. 425.

⁶ *Dillon v. Dillon*, supra.

⁷ *Moorsom v. Moorsom*, supra.

⁸ *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27; *Anichini v. Anichini*, 2 Curt. Ec. 210, 7 Eng. Ec. 85, 86.

his connivance at her subsequent misconduct.¹ In one case Lord Stowell held, under the circumstances of the case, that, where the wife had committed adultery on the first of three successive nights; and the husband, knowing and having full proof of this, slept with her on the second, without any reason to believe she had repented of the offence; he not only condoned thereby the previous adultery, but he could not take advantage of her further adultery on the third night, being presumed to have given to it his consent.² On the other hand, when the condonation has proceeded from the wife, it has been considered rather a virtue in her; and the courts have refused to infer connivance from it against her, where, under like circumstances, they would infer it against the husband.³

§ 23 [346]. So the husband's conduct after he knows that adultery has been committed by the wife, may be evidence of his connivance, but it is not connivance itself. Of this nature is culpable indifference to it;⁴ shown, for instance, by his delay to institute proceedings for divorce,⁵ or by his

¹ *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22; *Dunn v. Dunn*, 2 Phillim. 403, 411, 1 Eng. Ec. 280, 284, where Sir John Nicholl says: "If the adultery is forgiven with such extreme facility as to show no sense of injury, and no care is taken to prevent it from happening again, then the husband has no ground of complaint, for he has encouraged the adultery by his conduct." But see s. c. in Court of Delegates, 3 Phillim. 6, 1 Eng. Ec. 353. And see observations of Sir John Nicholl, in *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 316, 319, 323; *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27; *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290; *Walker v. Walker*, 2 Phillim. 153.

² *Timmings v. Timmings*, *supra*. See also *Phillips v. Phillips*, 1 Robertson, 144, 158; ante, § 17 and note; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 15.

³ *Angle v. Angle*, 12 Jur. 525; ante, § 17. See post, § 23, note. And see observations of Sir John Nicholl, in *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1; 4 Eng. Ec. 238, 290.

⁴ *Stone v. Stone*, 1 Robertson, 99, 3 Notes Cas. 278, 307.

⁵ *Kirkwall v. Kirkwall*, 2 Hag. Con. 277, 4 Eng. Ec. 541. This was a suit by the wife, alleging her husband's adultery; and her delay to institute the suit was held not to be sufficient evidence of her connivance. Lord Stowell observed: "There is nothing in the facts charged to show, that Lady Kirkwall's suspicions must, of necessity, have been excited, or that the adultery might not have taken

neglect to interfere while she is living, with his knowledge, in adultery.¹ Thus where the wife had resided with her children in a gentleman's house, of which she was treated as the mistress, and had there been delivered of three children; without any express permission by the husband appearing, but without his sufficiently accounting for his absence, or providing for her, or interfering with such residence; Sir William Wynne was of opinion, that he must be presumed

place without her knowledge; but supposing that she was acquainted with it, though a husband is bound to take prompt notice of the infidelity of his wife, and is liable to have his neglect for so doing urged against him, when afterwards seeking his legal remedy; yet this doctrine is not to be pressed against a wife, unless in very particular cases. Even in the case of a husband, it is not invariably expected that he should show the time when the charge first came to his knowledge. It might be prudent, and expedient for the success of his suit, that he should do so, but it is not absolutely necessary—something must be allowed to convenience. Certainly a wife would not be justified in living in the same house with her husband's concubine, sharing the turpitude of his crime, and partaking of a polluted bed; but she might have a reasonable hope of his return to her society, and forbearance, under this *spes recuperandi*, has never yet been held to constitute a bar to her legal remedy, when every hope of that kind should be extinct. I, therefore, admit this libel to proof." And see, in connection with this case, *Ferrers v. Ferrers*, 1 Hag. Con. 130, 4 Eng. Ec. 354. See also *Angle v. Angle*, 12 Jur. 525, 634, 640, 641; ante, § 17, 22; *Reeves v. Reeves*, 2 Phillim. 125, 1 Eng. Ec. 208; *Ruding v. Ruding*, 1 Hag. Ec. 740, note, 3 Eng. Ec. 314; *Durant v. Durant*, 1 Hag. Ec. 733, 760, 3 Eng. Ec. 310, 323; *Walker v. Walker*, 2 Phillim. 153.

¹ *Crewe v. Crewe*, 3 Hag. Ec. 123, 131, 5 Eng. Ec. 45, 49. In this case Lord Stowell remarked: "Another ground of objection is the connivance, or toleration, of the husband; he may have an insensibility to his own honor, and, from a conformity to the corrupt manners of the world, may have no wish to pursue a legal remedy, or may not think it worth pursuing; and, if such a person, after a long continuance of toleration, of himself awakes, or is compelled by the clamor and outcry of the world to awake, he awakes too late. If the adultery has gone on for a length of time, he does not stand before the court in the favorable light of a person acting on the spur of honest feeling, whom the law delights to succor; he has made up his mind to some other satisfaction. I do not mean by this to say, that the husband is immediately to rush into court upon suspicion; he must wait for adequate proof, but he is to show his vigilance; he is not to lie by, longer than to obtain proof; if he does, his lethargy will be fatal to any application that he may make; whatever his motives may be for coming afterwards, if it be proved that there has been a long course of criminal conduct of which he was cognizant, or of which by law and by presumption he must be supposed to have been cognizant, he cannot receive relief."

to have consented to the adultery.¹ It may be uncertain, however, whether the courts of the present day, in the United States, would give full effect to precedents of this nature,² though they would no doubt yield them a considerable degree of respect. For when a wife has committed adultery, the husband is under no further obligation, legal or moral, to support her, — How, then, can it be said, that he connives at her further adultery, merely because he refuses to pay her an annuity while living in it, or because he exercises no marital control over her person, after he has rightfully ceased to afford her his marital protection? There are several of the older English cases which magnify the office of husband somewhat beyond modern American opinions; making the wife a more complete satellite than either the facts of actual life, or the general sentiment with us, would indicate.

§ 24. In estimating the effect which considerations of relative rights and duties should have, not only upon the questions discussed in the last and in several of the preceding sections, but throughout these entire volumes, we should inquire, whether the right, on the one hand, or the duty, on the other hand, is a right or duty resting distinctly in the law, or is merely a matter of common usage in the community. If of the latter kind, the result to be deduced therefrom should change as the usage changes; if, of the former, the result should change only with the law. For example, by the law, not only as it formerly was, but as it now exists, the husband is entitled to fix the common matrimonial residence; therefore, in our first volume, the writer dissented from some modern notions according to which it was deemed not necessarily to be desertion for the wife to refuse, without known legal excuse, to follow the husband when he attempts to change the matrimonial domicile.³ Therefore also it is, that the author would not always deduce

¹ *Michelson v. Michelson*, 3 Hag. Ec. 147, 5 Eng. Ec. 56. And see *Crewe v. Crewe*, *supra*; *Whittington v. Whittington*, 2 Dev. & Bat. 64.

² See *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375. ³ Vol. I. § 788-790.

in the circumstances now under consideration, the same legal consequences which the judges of England do from like facts, where the usages of society are different.

§ 25 [347]. Articles of separation may be so framed as to constitute a license to the wife to live in adultery; and, if such is their true import, and is likewise the intent of the husband, he cannot have the remedy of divorce for the adultery to which he has thus consented. But suppose this intent is fairly deducible from the articles themselves, still the deduction may be controlled by counter evidence, outside, it seems, of the articles; and it must be so controlled, or he cannot have a divorce.¹ A deed of separation containing the usual covenants, that the wife may dwell where and in such manner as she pleases, and be free from the restraint of her husband; that he will not bring against her a suit for the restitution of conjugal rights; and others of like import; will not be construed as a consent to her living in adultery.² And if doubtful words will admit of a construction favorable to innocence, this construction will be given them, rather than the other.³

§ 26 [348]. In England, previous to Stat. 20 & 21 Vict. c. 85, it was customary, not necessary, for the husband, learning his wife's adultery, to sue at common law the *particeps criminis*, before proceeding in the Ecclesiastical Court; and then plead in this court the verdict, which, if in his favor, was considered as tending to rebut any presumption of connivance. Lord Stowell once remarked: "The verdict, giving such large damages, it is forcibly contended, rebuts the argument of connivance; for it shows, either that no such defence was attempted, or that it was not proved. It has been often observed, that a verdict to the disadvantage of the husband is strong evidence; because he

¹ *Barker v. Barker*, 2 Add. Ec. 285, 2 Eng. Ec. 307.

² *Sullivan v. Sullivan*, 2 Add. Ec. 299, 2 Eng. Ec. 314; *Richardson v. Richardson*, 1 Hag. Ec. 6, 3 Eng. Ec. 13, 15.

³ *Studdy v. Studdy*. 1 Swab. & T. 321.

is a party to both proceedings, and therefore such a verdict will operate in other courts; but a verdict against the adulterer is slight evidence against the wife, who is no party to the action, and who has no control in the conduct of it. At the time of the trial she is often at variance with the adulterer: he may have good reasons not to set up a defence which she may sustain. The defence of connivance is hazardous where the action is for damages, for it is to be proved by circumstances, and if it should fail it will inflame the damages.”¹

§ 27. The admission of a verdict, under such circumstances as are mentioned in our last section, is not quite in accordance with the general rules, on this class of subjects, prevailing in our common law courts. And perhaps—the writer does not here intend to preclude further inquiry, or to enter particularly into the question as it rests either in principle or in general authority—a doubt may be entertained, whether our tribunals, especially in cases tried before a jury, would receive to any extent, or for any purpose, unless in some exceptional case, for such a collateral matter as to show an absence of collusion, or the like, a verdict of the kind now under contemplation. The point is not hitherto elucidated by any reported decision; and this intimation is given only by way of caution to the practitioner.

¹ *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28, 37. And see *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21, 22; *Crewe v. Crewe*, 3 Hag. Ec. 123, 133, 5 Eng. Ec. 45, 49; *Phillips v. Phillips*, 1 Robertson, 144, 156; *Halford v. Halford*, Poynter Mar. & Div. 200, note; *Dunn v. Dunn*, 2 Phillim. 403, 1 Eng. Ec. 280, 285.

CHAPTER III.

COLLUSION.

§ 28 [350]. COLLUSION, in the matrimonial law, is an offence very near of kin to connivance. It is an agreement between husband and wife, for one of them to commit, or to appear to commit, or to be represented in court as having committed, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce or separation, as for a real injury.¹ Where the act complained of as ground for divorce has in truth not been done, collusion is a real or attempted fraud upon the court; where it has, it is also a species of connivance; in either case, it is a bar to the prayer for divorce. In one case, Lord Stowell is reported to have said: "Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose;"² doubtless a clerical error, or mistake of the reporter, corrected by a substitution of words, thus: "Connivance may exist without collusion, but collusion is (generally) connivance for a particular purpose."

§ 29 [351]. Collusion, being a species of conspiracy, to which two minds must consent, cannot be committed by the defendant alone; neither will any conduct amount to it, not implicating the party against whom it is set up.³ Therefore,

¹ *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 48; 1 Fras. Dom. Rel. 703; *Jessop v. Jessop*, 2 Swab. & T. 301. In the latter case the Judge Ordinary said: "Collusion is not, like condonation, a well understood term; it may be [among other things] by keeping back evidence of what would be a good answer, or by agreeing to set up a false case."

² *Crewe v. Crewe*, *supra*.

³ 1 Fras. Dom. Rel. 703.

if the party guilty of a matrimonial offence wishes to be divorced, this is not collusion: if he committed the offence with the expectation of thereby stimulating the innocent party to apply for divorce, as well as of furnishing foundation for it; or if, when a cause exists, both parties wish to have the matrimonial relation suspended or dissolved,—none of these things, no analogous things, will constitute collusion.¹ The question is, whether the plaintiff has suffered a real injury, and *bonâ fide* seeks relief; if so, there is no collusion.² Most unjust would it be, to refuse the remedy simply because the delinquent desired it should be applied. A proposition like this is tantamount to the absurdity of allowing a divorce, when the defendant has done a certain amount of matrimonial wickedness; but, when he adds another grain to the lump, refusing it.

§ 30 [352]. Collusion, like connivance,³ will not be presumed without proof, or matter appearing from which it may be affirmatively inferred.⁴ But the vigilance of the court may be aroused by slight circumstances, quite inadequate to prove collusion, yet calling for peculiar scrutiny in respect to every part of the evidence. Thus, Lord Stowell once remarked: "There are circumstances in this case which alarm the jealousy of the court, as appearing a little suspicious; there is no plea on the part of the wife, nor are any interrogatories administered. The verdict, which has been

¹ *Utterton v. Tewsh*, Ferg. 23, 4 Eng. Ec. 347, 358; *Kibblewhite v. Rowland*, Ferg. 226, 233, 3 Eng. Ec. 406, 408; *Sugden v. Lolly*, Ferg. 269, 3 Eng. Ec. 426; Note (B), Ferg. 363, 3 Eng. Ec. 482.

² *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 48, 49; *Brealy v. Reed*, 2 Curt. Ec. 833, 7 Eng. Ec. 328; *Shelford Mar. & Div.* 738. See *Mansfield v. Mansfield*, Wright, 284. If the suit is carried on by a plaintiff, not from any desire of his own to obtain the remedy, but for the benefit and at the request of the defendant, there are several principles which would lead the court to dismiss it. In one case, something like this was called by the court collusion. *Lloyd v. Lloyd*, 1 Swab. & T. 567, 573.

³ Ante, § 14.

⁴ *Pollard v. Wybourn*, 1 Hag. Ec. 725, 3 Eng. Ec. 308; *Deane v. Deane*, 12 Jur. 63, 64.

pleaded, was obtained nearly on a default, and without any defence. This proves a great facility, at least, and will make the court more vigilant to see that the two main points of such cases are sufficiently proved; namely, the criminal act, and that the person against whom the proof of that act is established, was the wife."¹ And when the plaintiff relies in whole or in part on the confessions of the defendant, he may find it necessary to show affirmatively, that there was no collusion, to give strength to the confessions.² In an Ohio case, in which the suspicion of the court was aroused, but there was still no sufficient proof of collusion, the plaintiff was permitted either to have his bill dismissed without prejudice, or continued, that he might produce further evidence, as he should be advised. He elected the latter course; and, on a hearing at a subsequent term, a decree was entered in his favor.³ Still the court is bound to grant the divorce, unless the collusion is established in evidence; for mere suspicion will no more justify the withholding of action, than it will justify action.⁴

§ 31 [353]. In Scotland, to prevent collusion, the pursuer is in all cases required to take what, in the language of the Scotch law, is termed the "Oath of Calumny." "It declares," says Mr. Fraser, "that he has just cause to insist on the action, because he believes (supposing it to be divorce for adultery), that the defender has been guilty of adultery, and that the libel is true; that there is no collusion between the parties to obtain the decree, and no agreement between any other persons on his behalf for that purpose. . . . Prior to the emission of the oath, it is competent for any party

¹ *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415.

² *Greenstreet v. Cumyns*, 2 Phillim. 10, 1 Eng. Ec. 165, 166; s. c. 2 Hag. Con. 332.

³ *Wolf v. Wolf*, Wright, 243. See also (and quere) *Smith v. Smith*, Wright, 643; *Friend v. Friend*, Wright, 639.

⁴ *Baily v. Baily*, 1 Lee, 536. See *Emmons v. Emmons*, Walk. Mich. 532; *Hanks v. Hanks*, 3 Edw. Ch. 469; a rule of court (N. Y. Rule, 168) made it necessary for the plaintiff to aver, "that the adultery charged in such bill was committed without his consent, connivance, privity, or procurement."

having an interest, such as the creditors of the defender, or for the court *ex officio*, to show that there is collusion; and this may be by the examination of witnesses, or letters, or the parties themselves. After the oath of calumny has been emitted, it is incompetent to inquire further as to whether there was collusion, and a reduction of the decree of divorce on this ground would be incompetent.”¹ Mr. Fergusson has said, that “the parties who commit this offence against the course of justice have such facility of concealment, and the inquiry is of so difficult and unpleasant a nature, that the records of the Consistorial Courts of Scotland do not, perhaps, exhibit a single attempt to detect this malpractice, which has been successful in the result.”²

§ 32. In like manner, by the present English law, it is provided, Stat. 20 & 21 Vict. c. 85, § 41, that “every person seeking a decree, &c., shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage.” And the prevention of collusion is further attempted by the later English statute of 23 & 24 Vict. c. 144, § 7, wherein, among other things, provision is made for the intervention of the Queen’s Proctor in cases where collusion is suspected.³

¹ 1 Fras. Dom. Rel. 701, 702.

² Ferg. 363, 3 Eng. Ec. 482; 1 Fras. Dom. Rel. 703. Something like the oath of calumny used to be required of the applicant for divorce before the House of Lords. Simmons’s Divorce Bill, 12 Cl. & F. 339.

³ See among other cases of intervention under this latter statute, *Drummond v. Drummond*, 2 Swab. & T. 269; *Gray v. Gray*, 2 Swab. & T. 263, 276, 554; *Cox v. Cox*, 2 Swab. & T. 306; *Jessop v. Jessop*, 2 Swab. & T. 301; *Latour v. Latour*, 2 Swab. & T. 524; *Gethin v. Gethin*, 2 Swab. & T. 560; *Marris v. Marris*, 2 Swab. & T. 530; *Boulton v. Boulton*, 2 Swab. & T. 638; *Pollack v. Pollack*, 2 Swab. & T. 648. So many cases, found in a single volume of reports, show, that this provision is by no means a dead letter; but I am not sufficiently acquainted with the undercurrents in the matrimonial law-practice of England to be able to state, whether this large business, done by the Queen’s Proctor in the way of intervening, is in every sense legitimate, or whether it is chiefly, or also, one of the outside modes of defence really resorted to by the parties.

CHAPTER IV.

CONDONATION.

- Sect. 33-35. Introduction.
36-45. The General Doctrine of Condonation.
46-52. Some Views attendant on the General Doctrine.
53-66. Conditional Qualify of the Condoning Act.
67-69. Distinction between the Law and the Evidence.
70, 71. The Evidence.
72, 73. Statutes relating to this Subject.

§ 33 [354]. THE next defence of a general nature, to be considered, is condonation. It differs from connivance the same as a plea in discharge of a contract differs from a plea denying its original obligation. In connivance, no injury is done to the party complaining; in condonation, the injury is forgiven. Condonation therefore, as applied to the subject under discussion, may be described in general terms to be the conditional forgiveness or remission, by the husband or wife, of a matrimonial offence which the other has committed.¹ The nature of the condition will be considered further on. While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned. The doctrine has its foundation in natural justice, and prevails in most civilized countries.²

¹ *Ferrers v. Ferrers*, 1 Hag. Con. 130, 4 Eng. Ec. 354; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 781, 3 Eng. Ec. 329, 334; *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 289; *Worsley v. Worsley*, 2 Lee, 572, 6 Eng. Ec. 249; *Smith v. Smith*, 4 Paige, 432; *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 323; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 12.

² *Johnson v. Johnson*, 4 Paige, 460, 1 Edw. Ch. 439; 1 Fras. Dom. Rel. 462,

§ 34. The first instance in which a definition of condonation is laid down in the English books, occurs, it appears, in the report of a case tried in 1858. There the Judge Ordinary instructed the jury, "that condonation means a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed." The conditional nature of condonation was not presented by the facts of the case; if it had been, the definition would probably have been qualified by the insertion of the word *conditional* before "blotting." The judge considered, that condonation means something more than forgiveness; it implies a reinstating of the wife in her former matrimonial position toward the husband. On a motion to set aside the verdict of the jury, the question of the correctness of this definition came before the whole court for consideration, and the full bench of judges concurred in holding it to be correct. Said Lord Chancellor Chelmsford: "I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the reinstatement of the wife in her former position; which renders proof of conjugal cohabitation, or the restitution of conjugal rights, necessary."¹ Without undertaking to criticise this definition, and without seeing any particular occasion to depart from the terms used in our last section as descriptive of the condoning act, — being the terms which were employed, as the definition of the act, in the earlier editions of this work, — the author will suggest, as a fuller and perhaps more exact definition, the following: Condonation is the remission of a matrimonial offence known to the remitting party to have been committed by the other; on the condition subsequent, that ever afterward the party remitting shall be treated by the other with conjugal kindness.

666. See note to *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158, 159; *Quincy v. Quincy*, 10 N. H. 272; *Anonymous*, 6 Mass. 147.

¹ *Keats v. Keats*, 1 Swab. & T. 334, 346, 357. This is a case of great interest. And see *Ratcliff v. Ratcliff*, 1 Swab. & T. 467, 473, as in effect affirming this doctrine.

§ 35. The further discussion of this subject will be conducted in the following order: I. The General Doctrine of Condonation; II. Some Views attendant on the General Doctrine; III. The Conditional Quality of the Condoning Act; IV. The Distinction between the Law and the Evidence; V. The Evidence; VI. Statutes relating to this Subject.

I. The General Doctrine of Condonation.

§ 36 [355]. Condonation, like connivance, rests, in a philosophical and exact view of the matter, in the mind. But there have been so many technical rules adopted, for the purpose of determining when the condonation has passed, that they, rather than the mere abstract doctrine, must lead the following discussion.

§ 37 [356]. The forgiveness now treated of may pass in words; that is, the condonation may be expressed in language; or it may arise, by implication, out of acts done.¹ In the former case, little difficulty can attend the subject; but, when the condonation is to be inferred, the question may create much embarrassment, being complicated of interwoven fact and technical law. There would seem possibly to be some doubt cast, by recent English discussions referred to in a previous section,² upon the question, whether, in law, a condonation can take place by mere words, or whether there must not be at least some accompanying act, by way of restoring the wife to her former matrimonial position. This question, however, is rather theoretical than practical; for, in facts actually transpiring, we could hardly imagine a case in which nothing but words should pass,—in which no act

¹ Quincy v. Quincy, 10 N. H. 272; Beeby v. Beeby, 1 Hag. Ec. 789, 3 Eng. Ec. 338, 340; Snow v. Snow, 2 Notes Cas. Supp. 1, 12.

² Ante, § 34. And see post, § 47, note.

affirmatory of the forgiveness should either attend or follow the words.

§ 38 [357]. A plain proposition is, that the forgiveness cannot take place without a knowledge of the existence of the thing forgiven.¹ When, however, one of the married parties has received knowledge of the breach of matrimonial duty by the other, if such party continues or renews the cohabitation, he is presumed, in law, to have condoned the offence;² for no man — so says the law — would take a delinquent wife to his bed, unless he had forgiven her.³ Probably this presumption cannot be rebutted by showing a simultaneous agreement or intent for the cohabitation not to operate as condonation; since, though the point appears not

¹ *Durant v. Durant*, 1 Hag. Ec. 733, 751, 3 Eng. Ec. 310, 319; *Popkin v. Popkin*, 1 Hag. Ec. 768, note, 4 Eng. Ec. 325, 326; *Keats v. Keats*, 1 Swab. & T. 334.

² *Delliber v. Delliber*, 9 Conn. 233; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Dysart v. Dysart*, 1 Robertson, 106, 108; *Phillips v. Phillips*, 4 Blackf. 131; *Wood v. Wood*, 2 Paige, 108; *McDwire v. McDwire*, Wright, 354; *Threewits v. Threewits*, 4 Des. 560; *Johnson v. Johnson*, 4 Paige, 460; *Mayhugh v. Mayhugh*, 7 B. Monr. 424; *Hall v. Hall*, 4 N. H. 462; *Quincy v. Quincy*, 10 N. H. 272; *Barnes v. Barnes*, Wright, 475; *Questel v. Questel*, Wright, 491; *Cooper v. Cooper*, 10 La. 249; 1 Fras. Dom. Rel. 666; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 12; *Buckholts v. Buckholts*, 24 Ga. 238; *Marsh v. Marsh*, 2 Bearsley, 281; *Backus v. Backus*, 3 Greenl. 136; *Twyman v. Twyman*, 27 Miss. 383; *Harper v. Harper*, 29 Miss. 301. In *Evans v. Evans*, 7 Jur. 1046, where the bringing of a suit for the restitution of conjugal rights, and a cohabitation following, were held to be a condonation, Dr. Lushington seemed to regard even the institution of the suit alone as sufficient, without the cohabitation. His words are: "If the treatment of a wife be such as to render the return to cohabitation unsafe, the commencing of a suit for the restitution of conjugal rights is a perfect condonation; for surely, if a husband has been guilty of conduct towards his wife endangering life and limb, it is rather an extraordinary mode of procuring redress to resort to a suit for the restitution of conjugal rights — to return to the very person whose conduct has been the cause of the danger. I must say, that such a measure does create a very strong presumption that the wife never could have considered her life in danger, when she voluntarily seeks a forced return to that state where she will be exposed to a repetition of such conduct, and that without protection." s. r. query, *Neeld v. Neeld*, 4 Hag. Ec. 263, 268. The point put by Dr. Lushington, however, should rather be regarded as being, that, in a case of alleged cruelty, the conduct of the wife shows this offence not to have existed in fact.

³ *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338, 340.

to have been directly adjudicated, no instance of the affirmation of this proposition being maintained is found in the books; while, if such a doctrine were allowed to prevail, it would place the marriage relation of the parties, as to its continuance, in their own hands, and they could treat it, after these facts had transpired, practically as a mere temporary arrangement, contrary to the general policy of the law. And Parsons, C. J., remarks: "It would be injustice to the wife, and immoral in the husband, to claim and enjoy as his peculiar marital rights the society of his wife, after a knowledge of her offence, and afterwards to cast her off for that same offence."¹

§ 39 [358]. But let us inspect more minutely the principles just stated. There must, we said, be a knowledge of the offence.² This implies, first, the existence of it; secondly, a belief of its existence. "The true import of the rule, in my opinion," said Parsons, C. J., "is, that the cohabitation of the husband, after the commission of the offence, and after *he believes*, on probable evidence, the guilt of his wife, is conclusive evidence of the remission. For he cannot be considered as having impliedly forgiven a crime which he does not believe to have been committed. And without that belief he cannot have knowledge of the crime; for he may have received the information without giving it credit."³ But people usually believe on sufficient grounds of belief being presented: so presumes the law. Thus, where a woman sued for divorce alleging her husband's adultery, of which he had been convicted criminally; and he showed in defence, that, after his conviction, she, with knowledge of it, lodged two or three nights with him in prison, where she had sexual intercourse with him; her prayer was denied, although it was urged for her that she might not have believed he was guilty.⁴

¹ Anonymous, 6 Mass. 147, 148.

² Ante, § 38.

³ Anonymous, 6 Mass. 147. And see *Dillon v. Dillon*, 3 Curt. Ec. 86; 114, 7 Eng. Ec. 377, 390.

⁴ *Delliber v. Delliber*, 9 Conn. 233.

§ 40 [359]. Therefore the rule is usually stated to be, that the cohabitation, after *probable knowledge* of the offence, is a presumptive remission of it.¹ This probable knowledge has been said to exist where information of facts has been given by credible persons, speaking of what they have seen; particularly if the party afterward produces these persons as witnesses in the case, and by their testimony establishes the same facts.² And where the husband's witnesses, he being promoter in a suit for adultery, had told their story to his legal advisers in his presence, yet he neglected for two years to institute proceedings, and cohabited with his wife meanwhile, he was held to have possessed the knowledge which renders cohabitation a bar.³ *A fortiori*, a plaintiff cannot continue the matrimonial intercourse during the pendency of the suit, without its working a condonation.⁴ Circumstances which excite suspicion merely, brought home to the mind of the party, will not alone amount to this probable knowledge.⁵

§ 41 [360]. Yet there are cases in which the husband was holden to have pardoned the adultery of his wife; at least, to have lost his right to complain of it; though the evidence of her misconduct, coming to his knowledge, was no more than sufficient to excite his vigilance, and put him on the inquiry. Thus, where a husband, having intimations and some evidence against his wife, neglected to make any investigation, and put forth no endeavor to prevent a repetition of the injury; but continued to cohabit with her till she left him and brought her suit for separation on the allegation of his cruelty; and he, in the first instance, set up her adultery in defence merely, not praying for a separation till a later stage

¹ *Shelford Mar. & Div.* 445; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 389; *Best v. Best*, in the Arches Court, *Poynter Mar. & Div.* 234, 235, note.

² *Poynter Mar. & Div.* 232; *Marsh v. Marsh*, 2 Beasley, 281.

³ *Dobbyn v. Dobbyn*, *Poynter Mar. & Div.* 233, note.

⁴ 1 *Fras. Dom. Rel.* 668; *Marsh v. Marsh*, *supra*; *Harper v. Harper*, 29 *Misso*. 301.

⁵ *Quincy v. Quincy*, 10 N. H. 272; *Kirkwall v. Kirkwall*, 2 Hag. Con. 277, 4 Eng. Ec. 541.

of the proceeding ; and the circumstances throughout showed him to have been willingly blind to her failings, and anxious to retain her whether she was guilty or not ; the court held, that he was not entitled to have his prayer for a divorce answered, though his charge of adultery was proved against her, and hers of cruelty was not proved.¹ Yet we may observe, of this case, that it plainly embraced a compound, not unusual in the English reports, of the two elements of condonation and connivance. Dr. Lushington has said : “ The truth is, and much of the obscurity arises from the fact, that, in the various discussions on this subject, the line of distinction between condonation and other conduct which would equally bar a remedy, has not, and I might perhaps say could not, be perfectly observed. Thus it is that condonation has been mixed up with that which, though it works the same effect, is totally dissimilar in its nature. Both husband and wife may so repeatedly forgive adultery, that the remedy is forfeited, the party showing an insensibility to the injury.”² We may observe also, that the above facts likewise disclosed what is sometimes technically called insincerity, — a matter of defence to be mentioned in a future chapter.³

§ 42 [361]. In another case, Dr. Lushington, debating the question of admitting an allegation responsive to the husband’s libel, observed : “ Although Dr. Dillon pleads, that he did not believe the information that his wife had slept, on the night of the 29th of December, with a strange man, at the inn at Gadshill ; he acts as if he did credit it, and he continues to cohabit with her on the very night of the day on which he receives the information. Now I have always understood the legal principle to be this : that, when a husband has received information respecting his wife’s guilt, and can place such reliance on the truth of it as to act on it, al-

¹ *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158 ; s. c. in the Arches Court, Poynter Mar. & Div. 234, note.

² *Snow v. Snow*, 2 Notes Cas. Supp. 1, 14. See *Crews v. Crews*, 3 Hag. Ec. 122, 132, 5 Eng. Ec. 45, 49 ; ante, § 22, 23 and note.

³ Post, § 103 et seq.

though he is not bound to remove his wife out of his house, he ought to cease marital cohabitation with her." But on the hearing of the case this learned judge did not deem the point to be conclusive against Dr. Dillon, though on other grounds he gave judgment for the wife.¹ If a person, the friend of an injured wife, makes an investigation concerning an adultery alleged to have been committed by the husband, and thereupon tells her there is no cause of suspicion, and she is therefore reconciled to him, she will be presumed to be ignorant of the adultery, and so there will be no condonation.²

§ 43 [362]. Indeed it has been said, — and this appears to be the sounder view, in principle, — that, for cohabitation to bar as a condonation the husband's remedy, it should be with his knowledge, not only of the offence committed, but of his ability to prove it.³ Because, should he turn off his wife on the charge, which he is unable to make good in proof, however well he may know it himself, that she is guilty, for example, of adultery, he would subject himself to pay for necessities which any person might furnish her, — to the suit, in England, for the restitution of conjugal rights, — to the suit, anywhere, for divorce, resulting in a decree against him for alimony, on the ground either of cruelty or desertion, such an act being a gross one of cruelty, though perhaps not alone sufficient, — to the reproaches, also, of the community in which he dwells, for having inflicted the heaviest injury on one whom he is supposed to be under the most extreme obligation to protect. Therefore to infer against him a forgiveness of his wife's adultery, because he is unwilling to cast himself on these perils for the sole purpose of becoming a matrimonial martyr, without the smallest prospect of accomplishing thereby any useful object, is to draw an inference as destitute of foundation in human nature or common

¹ *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 379, 389, 390.

² *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 240.

³ *Quincy v. Quincy*, 10 N. H. 272, 274.

truth, as the principle, acted upon, would be of any relationship to ordinary justice. In such a case, his cohabitation cannot properly be deemed "voluntary," within the true meaning of the rule making voluntary cohabitation a bar.¹ "A husband," says Lord Stowell, "has suspicions — he has some intimations — he has enough to *convince his own mind, but not to institute a legal case*. In that distressing interval, his conduct is nice; and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and, if he continues cohabitation, it then becomes liable to that species of imputation which has passed to the disadvantage of this gentleman:"² — "Observations," says Dr. Lushington, "which apply to a case where there is no direct evidence of the fact, although there are circumstances which render the fact probable;" and it seems to be conceded, that, under such circumstances, the husband is not barred by continuing to cohabit with the wife.³ But where his ability to produce the proof is commensurate with his knowledge, there is no scope for this distinction.

§ 44 [363]. In the last chapter, we considered some circumstances in which a party is held to connive at the adul-

¹ In *Hofmire v. Hofmire*, 7 Paige, 60, Chancellor Walworth seems to be of the opinion, that cohabitation, by the wife with her husband, after a private confession to her of an act of adultery which she is unable to prove, would not bar her suit for divorce, brought upon a subsequent discovery of the means of establishing his guilt. And he says: "His private admission of the fact to her was not sufficient to authorize her to take any proceeding against him, or even to protect her friends for harboring her against his will, if she had then abandoned his bed and board." See *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 337, where Lord Stowell says: "It is not shown she knew it so that she could legally prove it. If it was shown that he had avowed it to her, it might be a condonation as to that particular fact." But in *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 23, the same judge observes: "Although, by the rules of law, a confession does not satisfy the mind of the judge, it must satisfy the mind of the husband, particularly when direct and unequivocal, as in the present instance. And what is his behavior upon it? His mother, in an interrogatory, says, 'he wished his wife to go from him; but, on the intercession of friends, he consented to live with her.' This, then, is a direct condonation."

² *Elwes v. Elwes*, 1 Hag. Con. 269, 292, 4 Eng. Ec. 401, 412.

³ *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 389.

tery of the other party, because of being too free to forgive adultery committed.¹ The substance of the doctrine there stated is, that, as a man may be charged with a credit procured by a third person, if formerly he has paid similar claims, though he gave in fact no express authority to the third person; so a husband, overlooking readily an adultery committed by his wife, or especially overlooking from time to time repeated adulteries, may be presumed to tacitly authorize her to follow her adulterous course. But where no scope for this doctrine is found in the facts of a case, the cohabitation, to be a complete bar, must be with full knowledge of all the adultery; and the forgiveness of one act is not the forgiveness of another. Indeed a party might consent to pardon a single offence committed under mitigating circumstances, yet not to pardon more than one, much less a series of offences.² And there is a strong intimation in a late English case, which will be referred to again further on, that, if the party against whom the condonation is alleged, knew of only a part of the guilt of the other party, the condonation does not attach even to what was known.³ An insane person, on being restored to reason, may condone adultery committed during his insanity.⁴

§ 45 [364]. In circumstances wherein condonation is sufficiently inferred from cohabitation, there need not be a continued matrimonial intercourse; it is enough, at least with regard to the husband, if he has been once in bed with his wife, after knowledge of her adultery.⁵ It appears to be so also,

¹ Ante, § 22.

² *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 337; *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130, 136; *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 238.

³ *Dempster v. Dempster*, 2 Swab. & T. 438. See post, § 65.

⁴ *Parnell v. Parnell*, 2 Phillim. 158, 160, 1 Eng. Ec. 220, 222.

⁵ *Hutchison v. Hutchison*, a Scotch case, cited 1 Fras. Dom. Rel. 667; *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22; ante, § 22, 42; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 14.

in some circumstances, even with regard to the wife.¹ Yet the doctrine thus stated is not absolute and free from exception; it is qualified in various ways and degrees, particularly as applied to the wife. In sections further on,² this matter will be resumed; and the reader should take into his consideration what is said there, in connection with what is said here. And an excuse may exist for a brief cohabitation, which would not apply to a longer one; a difference, likewise, in respect to condonation, between adultery and cruelty.³

II. *Some Views attendant on the General Doctrine.*

§ 46 [365]. Where the husband and wife have separate beds, and no sexual intercourse, condonation is not always to be inferred from their living in the same house together.⁴ Poynter says, it is not necessary "that a husband should instantly close his doors upon an offending, and, it may be, repentant wife; recollecting her former innocence, he may indulge, at least, in some feelings of pity for her degraded situation; and, until a fit retirement is provided, allow her the protection of his roof, but not the solace of his bed." Yet he thinks "condonation may *possibly* be inferred, more particularly against the husband, if within a reasonable time the

¹ *Delliber v. Delliber*, 9 Conn. 233. See, however, *Gardner v. Gardner*, 2 Gray, 434; *Armstrong v. Armstrong*, 32 Missis. 279, 290, 298.

² Post, § 49-52.

³ *Snow v. Snow*, 2 Notes Cas. Supp. 1.

⁴ *Dance v. Dance*, 1 Hag. Ec. 794, note, 3 Eng. Ec. 341; 1 Fras. Dom. Rel. 666; *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 118, 4 Eng. Ec. 238, 292; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 733, 3 Eng. Ec. 329, 335; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 16. In *Westmeath v. Westmeath*, the husband, having inflicted acts of cruelty upon his wife, in consequence of which the parties separated under articles, — brought, subsequently to this separation, a suit against her for the restitution of conjugal rights. She answered this suit by setting up the antecedent cruelty, and prayed for a divorce; to escape from which, he replied in an allegation of condonation. And the court held, that her permitting him, at the urgent request of himself and their mutual friends, in order to prevent the rupture becoming public, to occupy, for a short time, a separate bedroom in her house, and to dine with her, did not amount to condonation; neither did it prove that she did not consider cohabitation unsafe. And see ante, § 42.

parties do not entirely separate.”¹ The general presumption is, that married persons living in the same house do live on terms of matrimonial cohabitation; but this presumption may be repelled by the circumstances of the particular case.² If the husband has removed his wife from him, and she alleges a condonation by an act of intercourse with her after such removal, she must prove such act by clear and distinct evidence.³

§ 47 [366]. A mere promise of future forgiveness, or an unaccepted invitation to the guilty party to return to the matrimonial bed, with an offer of condonation on this event, amounts to no more than a willingness to condone, or an overture, not binding till accepted, and subject to be withdrawn, like any other offer: it is not condonation, it does not bar the remedy.⁴ A contrary doctrine appears to have been in the minds of the judges in an Indiana case, where it was observed: “Although the testimony before us is extremely vague, it may yet be inferred, if any part is properly applicable to the charge of adultery, that the commission of that offence by the defendant was known to the plaintiff when he endeavored to induce her to return to him. Such an effort, made with knowledge of the fact, was a waiver of any right of relief.”⁵ But the doctrine here suggested is so foreign to the spirit of all just laws; it so overlooks also the established principle of our jurisprudence, that the thought of a man, undeveloped in act,⁶ is not to bind him; as to create doubt, whether it would be adopted, after consideration, by any court.⁷ Yet evidence of such an offer from a complaining

¹ Poynter Mar. & Div. 236. But see *Wright v. Wright*, 6 Texas, 3.

² *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. 338, 342; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 13; 1 Fras. Dom. Rel. 666.

³ *Campbell v. Campbell*, Deane & Swabey, 285.

⁴ *Popkin v. Popkin*, 1 Hag. Ec. 766, 3 Eng. Ec. 325, 326; *Ferrers v. Ferrers*, 1 Hag. Ec. 781, note, 3 Eng. Ec. 334; *Quarles v. Quarles*, 19 Ala. 363; *Peacock v. Peacock*, 1 Swab. & T. 183; *Severn v. Severn*, 3 Grant, U. C. Ch. 431.

⁵ *Christianberry v. Christianberry*, 3 Blackf. 202.

⁶ See 1 Bishop Crim. Law, § 312.

⁷ The case of *Keats v. Keats*, 1 Swab. & T. 334, is not only contrary to this In-

wife, in a cause of cruelty, might be important as showing she did not believe there was personal danger in the cohabitation; perhaps also it might, in some circumstances, afford auxiliary proof of condonation.¹

§ 48 [367]. A condonation may be inferred from the party's neglecting to prosecute a suit for divorce already commenced;² and this circumstance, contrary to the general rule,³ has been deemed to press more heavily against the wife than the husband.⁴ Perhaps the reason of this unusual discrimination in the husband's favor may be, that, after the wife has commenced her suit, she not only is out of his power or control, but she may ordinarily compel him to provide the means to carry it on; while he, if plaintiff, might be impelled to discontinue it from apprehensions of poverty. But matters of this kind plainly need to be considered in reference to the circumstances of particular cases, rather than to be developed into general rules. Moreover, the dismissal of a suit, by agreement of the parties, has been held to bar a future suit for the same cause; the principle being, it seems, that the agreement and dismissal operate as a species of condonation.⁵ We may doubt also, whether this would be the consequence under all circumstances.

§ 49 [368]. Condonation is not so easily inferred and is not so strict a bar against the wife as against the husband.⁶

diana doctrine, but it almost holds, perhaps quite, that no words alone, without some act of receiving back the wife, possibly it need not be sleeping in the same bed with her, will amount to condonation. And see ante, § 34, 37.

¹ See ante, § 38, note; post, § 48; *Johns v. Johns*, 29 Ga. 718.

² *Walker v. Walker*, 2 Phillim. 153.

³ Post, § 49.

⁴ *Betcher v. Betcher*, cited 2 Phillim. 155.

⁵ *Smyth v. Smyth*, 4 Hag. Ec. 509, 514.

⁶ *Wood v. Wood*, 2 Paige, 108; *Angle v. Angle*, 1 Robertson, 634, 640, 641; *Dance v. Dance*, 1 Hag. Ec. 794, note, 3 Eng. Ec. 341; *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290; *Turton v. Turton*, 3 Hag. Ec. 338, 350, 5 Eng. Ec. 130; *Walker v. Walker*, 2 Phillim. 153, 156; *Bowie v. Bowie*, 3 Md. Ch. 51; *Gardner v. Gardner*, 2 Gray, 434, 441; *Armstrong v. Armstrong*, 32 Missis. 279, 290, 298; 1 Fras. Dom. Rel. 667.

"A woman," says Lord Stowell, "has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the matrimonial vow; his guilt is not of the same consequence to her; therefore the rule of condonation is held more laxly against the wife."¹ "It is not improper," he remarks in another case, "she should for a time show a patient forbearance; she may find a difficulty either in quitting his house or withdrawing from his bed. The husband, on the other hand, cannot be compelled to the bed of his wife; a woman may submit to necessity. It is too hard to term submission mere hypocrisy. It may be a weakness, pardonable in many circumstances."² But this discrimination in favor of the wife will not be carried to extremes; neither will it be applied to cases in which the reason whereon, as a general doctrine, it rests, does not exist. It will not therefore justify the wife in living in the same house with her husband's concubine, sharing the turpitude of his crime, partaking of a polluted bed.³ And it has been considered in Scotland, with much apparent reason, that, if the wife is living beyond the influence of the husband, as with her father or brother, the same circumstances which would show a condonation by him, will show a like condonation by her.⁴ In accordance also with this enlightened view, Lord Stowell, in an English case, said: "It is material to observe, how the return to cohabitation was brought about; as it will weigh, whether there was a condonation, and what was the effect."⁵

§ 50 [369]. Cruelty may be the subject of condonation, as

¹ *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 337.

² *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338, 341. See also *Delliber v. Delliber*, 9 Conn. 233. And see remarks of Lord Meadowbank, in *Greenhill v. Ford*, cited 1 Fras. Dom. Rel. 667; and of Sir John Nicholl, in *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 319.

³ *Kirkwell v. Kirkwell*, 2 Hag. Con. 277; ante, § 23, note.

⁴ *Lothian on Consist. Law*, 163; 1 Fras. Dom. Rel. 668. See *Bowie v. Bowie*, 3 Md. Ch. 51.

⁵ *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 781, 3 Eng. Ec. 329, 334. And see ante, § 48.

well as adultery;¹ "and though," says Dr. Lushington, "in questions of condonation, I have almost uniformly found the same doctrine attempted to be applied to condonation both of adultery and cruelty, still I think the two offences are so distinct in their nature, that the same considerations cannot be equally applicable to both."² The acts of cruelty, with the means of proving them, are generally, not necessarily, known as they occur; and in almost every instance the cruelty consists, not in a single act, revealed at once, like adultery, but in "successive acts of ill treatment at least, if not of personal injury; so that something of a condonation of earlier ill treatment must in such cases necessarily take place."³ To hold, therefore, the doctrine strictly, as in adultery, might operate severely and unjustly.

§ 51 [370]. It has been apparently laid down in Massachusetts⁴ and Pennsylvania,⁵ that the doctrine of condonation, at least the presumption of condonation arising from cohabitation, is inapplicable, as against the wife, to causes of cruelty. This exception, unknown in England, is not generally allowed in the United States;⁶ and the cases which recognize it appear not to have proceeded upon any extensive or well-considered view of the subject.⁷ Indeed, the Massachusetts court, in a very late decision, expressly asserted the applicability of the doctrine in these circumstances;

¹ *Burr v. Burr*, 10 Paige, 20; *Whispel v. Whispel*, 4 Barb. 217; *Barnes v. Barnes*, Wright, 475; *Questel v. Questel*, Wright, 491; *McDwire v. McDwire*, Wright, 354; *Threewits v. Threewits*, 4 Des. 560; *Masten v. Masten*, 15 N. H. 159, 160; *Wright v. Wright*, 3 Texas, 168, 187.

² *Snow v. Snow*, 2 Notes Cas. Supp. 1, 15.

³ Sir John Nicholl, in *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290; 1 Fras. Dom. Rel. 462.

⁴ *Perkins v. Perkins*, 6 Mass. 69.

⁵ *Hollister v. Hollister*, 6 Barr, 449. See *Tiffin v. Tiffin*, 2 Binn. 202; *McKarracher v. McKarracher*, 3 Yeates, 56.

⁶ See cases cited ante, § 50.

⁷ This, however, is the doctrine of the Scotch courts; and, in *Scott v. Campbell*, the Commissaries sustained the following view of the matter, as a sufficient answer to a plea of condonation founded on cohabitation: "Separation from bed

overruling, if overruling were necessary, the former adjudication.¹ Still there are reasons which should lead the courts to apply the doctrine of condonation, in cases of cruelty, with great caution, and with a view to its equity, rather than its strict letter. The peculiar nature of the offence of cruelty, as generally witnessed, developing itself by degrees, and so slowly as seldom to reveal even to the sufferer the precise line between the endurable and the unendurable; the difficulty a wife experiences in making up her mind, in a single hour or day, whether she can longer bear her burden; the fact, that often she cannot herself know certainly, and at once, whether or not she is in bodily peril, which is the true criterion of legal cruelty, and, that while in suspense she must continue the cohabitation,—should lead to great caution in inferring, against her, condonation of cruelty, from subsequent cohabitation.²

§ 52 [371], Until the wife has determined to leave her husband, and cast herself on her legal rights, she should use the means best adapted to reclaim him. And Lord Stowell³ has laid it down, and Dr. Lushington has confirmed what

and board, upon the head of maltreatment, was, for the most part, founded on the multiplicity and renewing the acts of maltreatment, and therefore the continuing of cohabitation was never a good defence against this separation; for one act or two might not be sufficient, and yet a complication was, because it demonstrated a continuance of the malevolous mind, and therefore these acts of maltreatment were always conjoined, though there be an interim cohabitation in hopes of amendment; and, if it were not so, there could be almost no separations on the head of maltreatment, for, the acts consisting in a tract, it necessarily supposed an interim cohabitation, and was very different from the case of divorce on the head of adultery; because there one act is *violatio fidei conjugalis*, and therefore cohabitation, after knowledge thereof, was understood to be a tacit remission; which was very different from maltreatment.” 1 Fras. Dom. Rel. 462; *Macfarlane v. Macfarlane*, 11 Scotch Sess. Cas. n. s. 533. But in Scotland, condonations are not conditional, as in the English law; 1 Fras. Dom. Rel. 668; whence the necessity of the foregoing doctrine.

¹ *Gardner v. Gardner*, 2 Gray, 434, 441.

² “The last drop makes the cup of bitterness overflow.” Lord Jeffrey in *Macfarlane v. Macfarlane*, 11 Scotch Sess. Cas. n. s. 533.

³ *D’Aguilar v. D’Aguilar*, 1 Hag. Ec. 773, 781, 3 Eng. Ec. 329.

he said,¹ that patient endurance of ill-treatment is not only no bar to a wife's suit, but raises no presumption against the truth of her complaint. The latter of these judges observes, that "connubial cohabitation, after the last act of cruelty, is not necessarily and universally a bar, as condonation, to a wife's suit; even though such cohabitation may be, in one sense, a voluntary cohabitation, or may not be forced or fraudulently brought about by the husband;" and that "whether such connubial intercourse shall operate as a bar must depend on all the circumstances of each individual case." And where the parties were in a foreign country, and the wife, under the peculiar circumstances, continued her usual cohabitation with her husband for several days after his last act of cruelty, she was held not to be barred thereby.² A late case even intimates, that, if a wife leaves her native country with her husband and children, for the purpose of avoiding a separation from the children, and preventing their being left unprotected and alone in the hands of a cruel father, this continued cohabitation will not amount to condonation.³ But the court, in the former of the two cases last mentioned, carefully abstained from making any intimation, that the same lenient doctrine could be applied to adultery. There is a late Alabama case, going the extreme length of holding, that a wife, complaining of a gross act of cruelty, was not barred, though she had continued the cohabitation two years;⁴ but evidently the circumstances of such a case must be very peculiar, to accord with the general doctrine elsewhere.⁵

¹ *Snow v. Snow*, 2 Notes Cas. 1, 16.

² *Snow v. Snow*, *supra*; s. p. in *Popkin v. Popkin*, 1 Hag. Ec. 765, where, under different circumstances, a cohabitation which continued from early in December to the 6th of January was held not to bar the wife; s. p. also, *Dysart v. Dysart*, 1 Robertson, 106, 139, 541; *Whispell v. Whispell*, 4 Barb. 217.

³ *Curtis v. Curtis*, 1 Swab. & T. 192, 200.

⁴ *Reese v. Reese*, 23 Ala. 785.

⁵ See *Bowie v. Bowie*, 3 Md. Ch. 51; *Gardner v. Gardner*, 2 Gray, 434.

III. *The Conditional Quality of the Condoning Act.*

§ 53 [371 a]. Condonation is not absolute remission; but, proceeding on the idea of repentance having sprung up in the mind of the delinquent, it is not operative in a case where subsequent facts show no repentance to have existed. Hence comes what is called the conditional quality of condonation. The condition has been matter of some differences of judicial opinion, as to its precise limitations; but the doctrine which seems best established, as one alike of reason and authority, is this,—that the original offence is revived, the condition being violated, if the party forgiven does not both abstain from the commission of the like offence afterward; and moreover treat the forgiving party, in all respects, with conjugal kindness.¹ The differences of opinion, among judges and lawyers, relate to the latter branch of this proposition.

§ 54 [372]. As late as the year 1825, the precise limitation of the condition seems to have been open, in England, to some doubt; therefore when the case of *Durant v. Durant*² was argued before Sir John Nicholl, he invited the attention of counsel to this point. The view ultimately taken of the evidence rendered unnecessary any absolute decision of the question of doubt; namely, whether ill-treatment, not amounting to legal cruelty, would revive condoned adultery. In this case the particular ill-treatment consisted in making a false accusation of adultery against the wife, and turning her off. The accomplished judge leaned strongly to the opinion, that the condoned adultery was revived, and said: "Some propositions seem to be admitted; first, that condonation is accompanied with an implied condition; secondly, that the condition implied is that the injury shall not be

¹ And see *Davis v. Davis*, 19 Ill. 334.

² *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310.

repeated; thirdly, that a repetition, at least of the same injury, does away the condonation, and revives the former injury. So far the propositions are clear; but must the injury be of the same sort, be proved in the same clear manner, be sufficient *per se* to found a separation?

§ 55 [373]. "If nothing," he continued, "but clear proof of actual adultery will do away condonation of adultery, the rule of revival becomes nearly useless; for the revival is unnecessary. The only possible way in which the former adultery could bear, would be in, possibly, inducing the court to give some slight additional alimony; but it could not bear, even in that way, when the suit is brought by the husband; in which case, of course, there would be no question of permanent alimony. It appears therefore hardly to be consistent with common sense, that clear proof of an actual fact of subsequent adultery should be necessary to remove the bar; something short would be sufficient, and it seemed almost admitted, though no direct authority was adduced in support of the position, that solicitation of chastity would remove the effect of condonation of adultery;¹ but still it was maintained, that it must be 'an injury *ejusdem generis*.' It is difficult to accede to the good sense even of that principle; or to suppose, that the implied condition, upon which the forgiveness takes place, could be: 'You may treat me with every degree of insult and harshness, nay, with actual cruelty, and I bar myself from all remedy for your profligate adultery, only do not again commit adultery, or any thing tending to adultery;' the result of the argument is, that this must be supposed to be the condition implied when the condonation of adultery takes place. The plainer reason, and the good sense of the implied condition is, that 'you shall not only abstain from adultery, but shall in future treat me, in every respect treat me (to use the words of the law) with *conjugal kindness*, on this condition I will overlook the past injuries you have done me.' This principle, however, does

¹ See *Snow v. Snow*, 2 Notes Cas. Supp. 1, 14.

not rest wholly on its own apparent good sense, but the court has authority to support it." And he showed, that, as far back at least as 1730, facts of cruelty were clearly held to revive condoned adultery,¹ even though insufficient in intensity to support an original suit on the ground of cruelty.²

§ 56 [374]. Dr. Lushington, in a subsequent case, observed: "I take it to be acknowledged law, as laid down by the learned Dean of the Arches in *Durant v. Durant*, that cruelty, to revive condoned adultery, may be less violent in degree, and less stringent in proof, than when it forms the original charge. In my view that principle is quite consistent with reason; I subscribe to it, not only from deference to the superior court, but because I feel it to be most consonant to justice."³ Sir John Nicholl had already, in a case two years later than the one of *Durant v. Durant*, confirmed all he had said in it upon the subject, and without hesitation or qualification defined the condition attached by the law to condonation to be, that the suffering party shall thereafter be treated with conjugal kindness.⁴ We may therefore deem this the settled English doctrine;⁵ and Chancellor Walworth was justified substantially, though his words were not literally correct, when he said: "The English courts have held, that, to revive condoned adultery, it was not necessary that the new injury should be of the same nature; but that cruelty, desertion, or other improper conduct of the husband towards the wife was sufficient."⁶

¹ *Worsley v. Worsley*, 2 Lee, 572, cited 1 Hag. Ec. 734, 762, 764, 3 Eng. Ec. 311, 324. And see *Eldred v. Eldred*, 2 Curt. Ec. 376, 7 Eng. Ec. 144, 148. And see cases cited post, § 56.

² *Durant v. Durant*, 1 Hag. Ec. 733, 761, 3 Eng. Ec. 310, 323; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329.

³ *Bramwell v. Bramwell*, 3 Hag. Ec. 618.

⁴ *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290.

⁵ It is so laid down in *Waddilove's Digest*, p. 44, referring to *Durant v. Durant*, 1 Hag. Ec. 745, 761; *Ferrers v. Ferrers*, 1 Hag. Con. 130; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 781; *Snow v. Snow*, 2 Notes Cas. Sup. 10.

⁶ *Johnson v. Johnson*, 4 Paige, 460. Of the same opinion, as to the English

§ 57 [375]. In New York and several of our other States, adultery is ground of divorce from the bond of matrimony; cruelty, of separation only from bed and board. And the question has been made, whether, in these States, cruelty, or other conduct of a like legal tendency, will revive condoned adultery. If, by the English doctrine, imported into the United States, any conjugal unkindness is sufficient, cruelty plainly must be; for, though our law inflicts a heavier penalty upon adultery than the English law used to do, it does not transform cruelty into *conjugal kindness*. Yet this question has caused embarrassment in New York, where still the English rule is admitted to be as above stated.¹ The case in which the principal discussion rose, is *Johnson v. Johnson*. It was a bill for divorce on the ground of the husband's adultery, which had been condoned; but, to remove the effect of the condonation, the fact was shown on behalf of the wife, that, though there had been no subsequent adultery or even actual violence, yet the husband had totally neglected to attend to her comfort, had insulted her with opprobrious epithets and offensive language, and had otherwise pursued toward her a course of conduct calculated to wound her feelings and alienate her affections. Vice-Chancellor McCoun held, that the condoned adultery was thereby revived; Chancellor Walworth, on appeal, reversed this decision; the Court of Errors, on further appeal, reversed the decision of the Chancellor, confirming that of the Vice-Chancellor.² In a

doctrine, were the Vice-Chancellor, and, as far as appeared, all the members of the Court of Errors, in this case. 1 Edw. Ch. 439, 14 Wend. 637; *s. p.* *Burr v. Burr*, 10 Paige, 20, 34; *Whispell v. Whispell*, 4 Barb. 217; *Quincy v. Quincy*, 10 N. H. 272; *Phillips v. Phillips*, 4 Blackf. 131, note; *Langdon v. Langdon*, 25 Vt. 678; 2 Greenl. Ev. § 53; 2 Kent Com. 101, note.

¹ Ante, § 54.

² *Johnson v. Johnson*, in the V. C. Court, 1 Edw. Ch. 439; in the Ch. Court, 4 Paige, 460; in the Court of Errors, 14 Wend. 637; *Lockwood Reversed Cases*, 141. The opinion of the Court of Errors was pronounced by Chief Justice Savage, and concurred in by Mr. Justice Nelson, and Senators Armstrong, Beckwith, Bishop, Cropsey, Griffin, Kemble, Lacey, MacDonald, and Willes. Senator Tracey gave a dissenting opinion, in which he was sustained by Senators Downing, Edmonds, Edwards, Fisk, Lansing, Mack, Maison, and Van Schaick. When the court came

later case, in which the wife had forgiven her husband's adultery, and after this forgiveness he had committed a felony, and was sentenced for it to prison, Vice-Chancellor McCoun, confirmed on appeal by Chancellor Walworth, held, that the adultery was revived.¹

§ 58 [376]. Where the subsequent acts are of the same nature with the former ones, savoring also of them, there is no difficulty of principle in maintaining, that less is required than would establish an original complaint; and, to this point, the authorities are quite clear. "It is held," says Lord Stowell, "that words of heat and passion, of incivility or reproach, are not alone sufficient for an original cause; nor harshness of behavior; but I cannot but think their operation would be stronger in condonation. Words, otherwise of heat, receive a different interpretation, if, upon former occasions, they have been accompanied with acts; if it is apparent that the party was in the habit of following up words with blows; and, on these grounds, I am of opinion much less is sufficient to destroy condonation than to found an original suit."² So any conduct, which, after a reconciliation of the parties in a case of cruelty, creates reasonable apprehension of personal violence, will revive the condoned

to settle the decree, Senator Kemble said he had given his vote on the ground, that he did not regard the condonation as sufficiently established in proof, and that, therefore, he had not considered the question of revival. The reporter, in a note, since confirmed by Chancellor Walworth (*Burr v. Burr*, 10 Paige, 20, 35; but see *Whispell v. Whispell*, 4 Barb. 217), drew the inference, from this fact, that the question was still open in New York; but why, it does not appear, since, throwing out the vote of Kemble, for it could not be counted the other way, there would be left ten to nine. And Mr. Lockwood, in his *Reversed Cases*, p. 141, says: "We believe the profession consider the question very well settled by the opinion of Chief Justice Savage."

¹ *Hoffmire v. Hoffmire*, 3 Edw. Ch. 173; *Hofmire v. Hofmire*, 7 Paige, 60. And see post, § 64.

² *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 335. And see *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238, 290; *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 327; *Whispell v. Whispell*, 4 Barb. 217; *Burr v. Burr*, 10 Paige, 20; *Langdon v. Langdon*, 25 Vt. 678; *Harrison v. Harrison*, 20 Ala. 629; *Hughes v. Hughes*, 19 Ala. 307; *Webster v. Webster*, 23 Eng. L. & Eq. 216; *Sopwith v. Sopwith*, 2 Swab. & T. 160, 167.

cruelty;¹ in fact, it is cruelty itself.² The condonation having presumptively proceeded on evidence of a change of temper, acts which of themselves fall short of cruelty, may plainly show that no change did take place; and, though not of themselves sufficient evidence of danger to the injured party, may make the danger apparent when connected with what went before.³

¹ *Westmeath v. Westmeath*, supra; *Gardner v. Gardner*, 2 Gray, 434, 442; *Nogees v. Nogees*, 7 Texas, 538; *Wright v. Wright*, 6 Texas, 3, 21.

² Vol. I. 717, 729, 736.

³ Dr. Lushington, in considering the admissibility of a libel, made the following observations: "Has any thing occurred since March, which can revive the cruelty alleged to have taken place previously? Now this is a subject which has been discussed over and over again, in this court, and on which it is very difficult to lay down any precise or general principles; to revive condoned cruelty, there must be something of the same kind as would have supported a suit originally for cruelty, such as violence, or threats of violence; but the acts need not be of the same stringent kind; something short will be sufficient, provided it be shown, that the husband continues in the same state of mind, and as incapable of controlling himself, as when he actually committed the former acts of cruelty. Now, the eleventh and twelfth articles contain the charges of cruelty. The first averment in the eleventh article is, 'that the husband compelled the wife to sleep in a garret of his house, notwithstanding her lameness, arising from paralysis, while he himself slept separate and apart, in another room.' This charge, standing alone, is no act of cruelty of which this court can take notice; this court cannot compel parties, man and wife, to sleep together, in one and the same bed. Then it is alleged, 'that she is not permitted to enter any room in the house, except the parlor, in which she takes her meals.' Whether this is a measure of harshness or not, it is impossible for the court to say, unless all the circumstances are before it; *prima facie*, this cannot come within the rules of cruelty as laid down in this court. Then it is alleged, 'that the meals provided for her are of an unwholesome nature, consisting of particular meat, forbidden by the wife's medical attendants.' Now I must say this is a circumstance of a slight nature, which never yet found its way into a libel of cruelty. This court cannot investigate circumstances of this kind; and, supposing them to be proved, they never could be held to constitute acts of cruelty. Then the libel goes on to allege, 'that the husband has frequently got drunk, and, when so, has abused his wife with gross appellations.' Mere intoxication, unless leading to personal violence, is no ground for a divorce; no appellation, although gross and reprehensible, can give a legal ground for a separation. None of the matters alleged in the eleventh article constitute a revival of cruelty; assuming it to have been committed before the suit for restitution of conjugal rights. The twelfth article, after stating, in general terms, what is absolutely useless, 'that the husband continued his harsh and cruel behavior, as before the return of the wife'—what this means I do not know; no evidence could be taken in such an article—goes on to allege, 'that the husband removed the wife's walking-stick, or crutch; that he

§ 59 [377]. On a like reason, suppose the husband in the habit of drinking to intoxication, and of abusing his wife in his fits of drunkenness; and suppose the parties, after separation, to be reconciled on his promise of leading a temperate life; in such a case, the wife might show his former abuse, in connection with its cause, and show, that, subsequently to the reconciliation, he was intoxicated, in aid of her proofs of subsequent cruelty. And it was remarked by Desaussure, J., that, "if a woman forgives ill usage, and returns to her husband, on promises of good usage, she shall not afterwards obtain the protection and assistance of this court, if those promises have been faithfully kept, and she again leaves her husband from caprice; but, if there are clear indications of a breach of those promises, and some actual ill usage, she is not bound to wait for extremities, as in the first instance, but may depart as soon as she finds the promises violated, and her husband returning to his old bad habits. She has a right to judge of the future by the past; and the court will connect the whole of his conduct, in order to form a correct judgment."¹

§ 60 [378]. A case decided by the judicial committee of the Privy Council in 1840, is briefly reported as follows:—
"Though a slighter offence (not a slight offence) will revive

caused the windows of the parlor to be fastened and painted outside.' The first part is, I presume, meant to show that the wife is unable to make her escape; the second part I do not see the relevancy of. Taking this statement to the fullest extent, it only shows, that, during some parts of the months of June and July, the wife was not permitted to leave the house; this, standing alone, cannot revive former cruelty. I do not say, that, if the former cruelty had been of a different description, if blows had been struck, and life put in danger, or threats approaching to immediate violence, that harshness of conduct may not amount to a revival of cruelty, although in another shape, and less likely to lead to actual commission. In this case there is not one act of cruelty; there is no personal violence, no one threat; nothing, in short, which the wife did not risk the peril of when she took upon herself the yoke of matrimony. I reject this libel." *Evans v. Evans*, 7 Jur. 1046. Ante, § 51, note. See *Franklin v. Franklin*, 7 Jur. 135; *Curtis v. Curtis*, 1 Swab. & T. 192; *Bostock v. Bostock*, 1 Swab. & T. 221.

¹ *Threewits v. Threewits*, 4 Des. 560. See also *Questel v. Questel*, Wright, 491; *Calkins v. Long*, 22 Barb. 97.

an offence condoned, and will, combined with it, operate as a ground of divorce ; still the allegation of a subsequent offence will not so revive the former one as to render it admissible as a portion of the proofs, or as a corroboration of doubtful proofs, or as a complement to insufficient proofs, of the subsequent act."¹ Now, if this is a correct statement of the case, and if the court intended to affirm, that evidence of the condoned and subsequent conduct cannot be viewed together, but that the condonation has opened a chasm not thus to be passed,² we may find it difficult to reconcile the decision either with the foregoing principles, or with reason ; unless it proceeded on special circumstances, as that the prior offence was of a nature different from the subsequent. It is not probable the learned tribunal intended to overrule the case, for example, of *Turton v. Turton* ; where, adultery having been committed by the husband with the wife's sister, and condoned by the wife ; and the sister having afterward lived in the same house with the husband and wife ; Dr. Lushington observed : " The cohabitation of the husband and the sister of his wife appears to have continued up to the commencement of the cause ; for I take it to be clear, that, according to the doctrine of this court, and according to all the principles in similar cases, if it can be once shown that the parties have been cohabiting in an illicit connection, it must be presumed, if they are still living under the same roof, that the criminal intercourse subsists, notwithstanding those who live under the same roof are not prepared to depose to that fact."³ Undoubtedly every condonation rests

¹ *Collett v. Collett*, 8 Monthly Law Mag. 158, Wadd. Dig. 44. The true construction of this language clearly is, to consider the particle "it" as referring, for its antecedent, to "offence condoned" and "former one" throughout ; for if, in the second place where this particle occurs, it is referred to "allegation," the entire period amounts to but an awkward affirmation of the truism, that one's own *allegation* is no part of his *proofs*.

² That the prior and subsequent conduct may be looked at together, see *Sinton v. Irvine*, 11 Scotch Seas. Cas. 402 ; *Reg v. Dunn*, 12 Ad. & E. 599, 619. And see *French v. French*, 14 Gray, 186, 188.

³ *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130, 136 ; *Smith v. Smith*, 4 Paige, 432.

on the idea of the condoning party having had evidence of reformation in the other;¹ whence it would be unreasonable, under many circumstances, to connect the prior misconduct with the subsequent, in aid of proof of the subsequent, without something to show the revival of the old intent, or to rebut the presumption of a change of intent, growing out of the condonation.

§ 61 [379]. There appears to be some foundation for the doctrine, not established by any direct adjudication, that an offence may be so obliterated by forgiveness as not to admit of revival. Thus in *Dysart v. Dysart*, Dr. Lushington said: "I must inquire, whether any one in particular, or all united, of the transactions I have examined, demand from the court a separation. Will the occurrence at Irnham, in 1824, proved by one witness, and condoned for thirteen years — condoned by acts without number, by a long series of conduct which denotes a total oblivion, an entire forgiveness of it in every step taken, a conduct wholly inconsistent with a fear, or even apprehension, of repetition? I doubt the doctrine of revival applying to such a case at all."² If we allow this exception to the general doctrine of condonation, we surely shall not be able to find for it any satisfactory foundation of reason. Because, when forgiveness passes once, all passes which results from forgiveness, under the circumstances existing; and, when the act of forgiveness is repeated under the like circumstances, nothing can pass with the act except what would have passed if it were an original forgiveness. Parties cohabiting forgive daily by the very cohabitation, yet what is done on the one hundredth or one thousandth day is only what is done the first day. If the condonation on the thousandth day is without condition, equally must it be on the first; if on the first it is with condition, so must it be on the thousandth.

¹ *Ants*, § 54, 57.

² *Dysart v. Dysart*, 1 Robertson, 106, 141, 142. And see observations of Lord Stowell in *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338.

§ 62 [380]. Whether any express words may add to the condonation a condition beyond what the law without the words attaches, is a question at least doubtful upon principle,¹ not settled also by authority. Dr. Lushington in one case observed: "This condonation is not only conditional in the eye of the law, as all condonations are, but it is expressly so." And he added: "Assuming that the condonation was complete, and extended to all the previous adultery, under what circumstances and on what conditions was it given, and what was the duty of the husband, and what was his conduct afterwards? He solemnly engaged to separate himself from this woman, and, if possible, not to carry on the least correspondence with her; yet, shortly after this, Mr. and Mrs. Bramwell go to Epsom, and he clandestinely returns with Jeffrey [the *particeps criminis*] to Tunbridge Wells."²

§ 63 [380 a]. Looking at this matter of the condition in condonation, rather in the light of principle than of precise adjudication, we have the following points: Except in cases where the condonation passes by express words, it is a mere legal fiction, founded indeed oftentimes in fact, yet still a legal fiction, introduced into the law for the purpose of promoting virtue and honor and repentance in the parties toward each other and toward the community. But when the law creates, as it often does, a mere fiction, to subserve justice, it moulds that fiction into the shape which the judges deem best adapted to this end. But what shape should the condition in condonation assume, in order to make it efficient for good? After a matrimonial offence has been committed, an unrest of mind has been produced in the injured party; and, though such party might be willing to give the other a trial of future matrimonial fidelity, if sure of retaining his remedy should the trial fail, he would not otherwise be willing. But what would the injured party, looking at the question in the light of reason, deem to be a failure? Would he look merely at

¹ Ante, § 38.

² *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 238, 239.

what the law had already set down as cause of divorce? Would he not rather deem the withdrawal, by the other, of conjugal kindness, to such an extent as practically to destroy the peace which men and women seek in the marriage relation, to be a failure? On the other hand, the erring one, conscious of error, should for the very reason of the error be particularly careful to do exactly right afterward. And unless this were understood to be the true legal view of condonation, who, knowing the law, would dare to condone? There must be some practical difficulty in applying this doctrine, yet the doctrine thus stated rests in reason; and, it is submitted, in the better authority also.

§ 64. Since the foregoing sections were originally written, there have occurred two English cases worthy of separate notice. In one of these it was held,—the court evidently not attempting to draw the most extreme outer boundary line,—that all condonation is conditional on no offence of which the matrimonial court can take cognizance, being in future perpetrated; therefore, that, where the husband's adultery and cruelty are together ground for a divorce from the bond of matrimony at the suit of the wife, and the husband has committed cruelty which the wife has condoned, then he has committed adultery,—this latter offence both revives the former, and furnishes, in conjunction with the former, full cause for the full divorce. Said the learned Judge Ordinary, Cresswell: "The cases cited establish, that, if a marital offence which might have been the foundation of a sentence in a matrimonial court has been condoned, it is revived by any subsequent offence which might itself have been the ground of a sentence of divorce *a mensa et thoro*; and this on the ground, that condonation is always assumed to be conditional, and the condonation extends, not only to a repetition of the same, but of any other marital offence which falls within the cognizance of a matrimonial court."¹ The principle of this case, if it be admitted in this country, settles the law that,

¹ *Palmer v. Palmer*, 2 Swab. & T. 61, 62.

where a particular matrimonial offence is ground for a divorce from the bond of matrimony, and another such offence is ground for divorce from bed and board, and the former has been condoned, and the latter is afterward committed, the condoned act is revived, and the full divorce may be had by reason thereof,—in accordance with the doctrine established, as we have seen, after much controversy, in New York.¹ Still, five days after this English case was decided, the same learned judge stated it to be a “curious question,” which he did not pass upon, whether the husband’s bigamy, under the divorce statute, would be revived by his subsequent adultery or cruelty.²

§ 65. The other of the cases mentioned contains, not a decision, but a strong intimation, upon a point which may be deemed new. Where a wife asks for a divorce from the bond of matrimony on the ground of the husband’s adultery and cruelty combined, and it appears, that, after both were in fact committed, she, knowing of the existence of the cruelty but not of the adultery, condones the former,—Is this condonation a bar, even as respects the cruelty? The learned Judge Ordinary, Cresswell, seemed to be of opinion that it is not; but it was not necessary to decide the point. He said: “Adverting to the acknowledged principle, that all condonations are conditional, and that any subsequent delinquency is a breach of the condition, why should it not be held, that another branch of the condition is, that the wife has been made acquainted with all her husband’s delinquencies, and that, if she has not, the right to complain of that which has been condoned shall revive, the condonation having been, in a manner, obtained under false pretences? It may be said, that the case of adultery differs from that of cruelty and adultery, and that the whole of the cruelty being known, may be well condoned, although nothing is known of the adultery. But the same is true of adultery with A. and B.; the whole of the delinquency with A. may be known. The reasons above

¹ Ante, § 57.

² *Furness v. Furness*, 2 Swab. & T. 63.

suggested are, therefore, as applicable in the one case as the other."¹

§ 66. An examination of the cases will show, that this judicial intimation is not in conflict with any of the decisions. And an examination of the principle upon which the law of condonation rests, will make it apparent, that the doctrine, if received, will be found to harmonize with the other and admitted branch of the condition. It accords likewise with the law of our nature, which prompts men to refuse to forgive in part unless they can forgive in whole; and sets bounds to the capacity of forgiveness, as well as to every other act of the intellect and will.

IV. *The Distinction between the Law and the Evidence.*

§ 67. Where divorce causes are tried before a jury, the question of condonation or no condonation is one of fact, which the jury is to decide.² Yet it is plain, that, connected with this question there are, or may be, the same as with other questions of fact, points and queries of law to be passed upon by the judge. And the line which here separates the law and the evidence does not lie so clear to the legal sight as it is seen to lie in connection with some other of our titles. The condonation is an act of the mind. If, therefore, a husband has voluntarily cohabited with his wife after he knew she had committed adultery, and knew he could prove it, is the judge to submit the question to the jury to decide, whether, in fact, there did transpire within the husband's brain or breast this mental operation of condoning? It is easy to answer this query in the negative and say, that the law conclusively presumes condonation when cohabitation has under such circumstances taken place. But suppose the wife is the complainant, and it appears, that, when she and her husband

¹ *Dempster v. Dempster*, 2 Swab. & T. 438, 440. And see ante, § 44.

² *Peacock v. Peacock*, 1 Swab. & T. 183.

were in a foreign country, situated so and so, as the testimony explains, she for the first time became aware of the existence of the adultery, yet, for reasons which the testimony also unfolds, she continued to occupy the same bed with him until an opportunity, which the testimony states in detail, occurring, she, in so many days after she became cognizant of the adultery, withdrew from his bed and table,—suppose the facts here indicated are shown beyond dispute,—What has the judge to do with them, what has the jury?

§ 68. To the writer of these volumes it seems, that, in all cases in which there is no doubt as to what did transpire,—no doubt, also, as to what the party against whom the condonation is alleged knew to have transpired,—no doubt as to what cohabitation, under knowledge had, did take place,—the question, whether the cohabitation shall be holden to have worked a condonation, is one of law for the judge, not of fact for the jury. Yet it will be seldom that a cause will present itself in this way for trial; there will be testimony conflicting or uncertain in its nature, or testimony upon the result of which the parties will not agree, then, when the testimony is in, the judge must state to the jury the general principles relating to condonation, and tell them, that, if they are satisfied such and such things took place, they must find such a result; if not, such another result; and so on, as in other cases which are made up of law and fact in combination.

§ 69. The foregoing suggestions are not intended to be an answer to all the queries which may arise under this sub-title; but they conduct the reader as far out from the line of adjudication, and as far within the region of speculation, as the writer deems it prudent to go.

V. *The Evidence.*

§ 70 [385]. Condonation may be inferred on less conclusive evidence than connivance; since, in the language of Dr.

Lushington, it "may take place without imputing, either in the case of a wife or a husband, the slightest degree of blame; especially in the case of the wife, whose conduct might be more meritorious from her forgiveness of injury. But connivance necessarily involves criminality on the part of the individual who connives; and, as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be the more grave and conclusive."¹ Still the evidence of condonation must, at all points, affirmatively establish the allegation. Thus, it is not sufficient to show cohabitation subsequent to an act of adultery; the proof must go further and establish, that the plaintiff knew of the adultery at the time of the subsequent cohabitation.²

§ 71 [386]. A deed of separation, executed subsequently to the condoning of acts of cruelty, has been deemed good evidence by way of establishing a revival of the offence. Thus Sir John Nicholl said: "As a deed of separation upon mutual agreement on account of unhappy differences, though containing a covenant not to bring a suit for the restitution of conjugal rights, these articles would offer no impediment to the husband's present suit; but, as evidence against him necessarily implying a confession of ill-usage subsequent to the condonation, they appear unanswerable, and are a strong acknowledgment that the *casus fœderis* had occurred. On that confession alone, coupled with the character of his temper and former acts, if the case had even rested here, if the parties had never met after the execution of that deed, I should have entertained considerable doubt, whether the husband was entitled to the aid of the court to compel his wife to return; and whether the court would not, at least, dismiss the wife,"—the case being one in which the husband

¹ *Turton v. Turton*, 3 Hag. Ec. 388, 5 Eng. Ec. 130, 136; ante, § 14.

² *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 319; *Popkin v. Popkin*, 1 Hag. Ec. 776, note, 3 Eng. Ec. 325, 326. "The previous knowledge of the adultery must be clearly made out; and the circumstances from which it is to be inferred, require to be of pregnant and indisputable import." 1 *Fras. Dom. Rel.* 668, refers to *Greenhill v. Ford*, 1 Shaw Ap. Cas. 435.

band sued for restitution of conjugal rights, and the wife defended by setting up the cruelty.¹ Surely, however, the evidence of revival to be drawn from the mere fact of separation must be slight; and, if it is to come from the language of the deed, then the question of the effect of the language must vary, of course, with the words employed.

VI. *Statutes relating to this Subject.*

§ 72 [387]. There has been, in this country, little legislation to vary the common law doctrine, as unfolded in this chapter, concerning condonation. Our statutes are generally but in affirmance of the common law. The North Carolina act has perhaps destroyed, in that State, the conditional quality of condonation. It provides, that, if the husband has admitted his wife into conjugal society, after he knew of the criminal fact, it shall be a perpetual bar to a divorce; but it is not construed to deprive the husband of his right to a divorce for subsequent adultery.² The civil code of Louisiana directs, that the action shall be extinguished by a reconciliation, though the party may "bring a new suit for causes arising since the reconciliation, and therein make use of the former motives to corroborate his new action." Therefore sufficient cause of divorce must have arisen subsequently to the reconciliation.³

§ 73. There are, in some of the other States, statutes which may have varied the doctrine; but this is a matter into which each practitioner is expected to look for himself. The writer does not even hold himself responsible, that there

¹ *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 115, 4 Eng. Ec. 238, 291.

² *Collier v. Collier*, 1 Dev. Eq. 352. But in such a case the court might exercise its discretion to grant a divorce from bed and board only. *Ib.* And see *Earp v. Earp*, 1 Jones Eq. 239, 241.

³ *J. F. C. v. M. E.*, 6 Rob. La. 135; *Bienvenu v. Buisson*, 14 La. An. 386. See, as to Texas, *Nogees v. Nogees*, 7 Texas, 538.

may not have been changes in the laws of the States mentioned in the last section, effected since the cases there referred to arose. And let it here be repeated, what has been more than once said in the foregoing pages, that the writer does not profess to give the last amended legislative acts existing in any one State of our Union, as respects any one topic whatever. These are not volumes of statutory law, but of the unwritten or common law; embracing, of course, such matters, among the rest, as concern the interpretation of those statutes which relate to the subject.

CHAPTER V.

RECRIMINATION.

SECT. 74-77. Introduction.

78-82. A General View of the Doctrine.

83-96. Particular Propositions.

97-100. Effect of Condonation on the Recriminatory Fact.

101. Distinction between the Law and the Evidence.

102. The Evidence.

§ 74. THE doctrine of recrimination rests in the clearest reason and in exact justice. Yet questions of a very grave kind arise respecting the precise limits of the doctrine, and respecting its application in particular cases. Indeed we shall see, further on, that even the doctrine itself has by some been denied. There is no form of truth, no form of beauty, no form of justice, which does not sometimes find revilers.

§ 75 [388]. Without undertaking to speak with entire exactness it may be observed, that, through all the field of our jurisprudence, there extends the one general doctrine, modified variously in various relations, yet everywhere preserving its identity, according to which, he who is himself in the wrong cannot be heard to complain in a court of justice of another's wrong, pertaining to the same matter.¹ And it is not sufficient that the plaintiff is less faulty than the defendant; he must come into court, as the expression is, with *clean hands*.² Thus, in a suit for collision, resulting

¹ *Bush v. Brainard*, 1 Cow. 78; *Burckle v. Dry Dock*, 2 Hall, 151.

² *Collins v. Blantern*, 2 Wils. 341, 350; *Gregg v. Wyman*, 4 Cush. 322; *Rex v. Eden*, Loft, 72; *Anonymous*, Loft, 314; *Willinck v. Davis*, Harper, 260;

from the defendant's careless driving, or from an obstruction placed by him in the highway, the plaintiff must himself have driven carefully, or he will not be entitled to recover.¹ In a suit for the breach of a contract resting in mutual and dependent covenants, the plaintiff, if he would succeed, must have kept his covenants.² A woman seduced³ cannot maintain against the seducer an action for the seduction and getting her with child; because she also was in the wrong, for she yielded to his embraces.⁴ A man who, in violation of a public statute, sells intoxicating drinks without license, cannot maintain an action for libel by reason of a publication made concerning him in his business of violating the statute;⁵ neither will an action lie for a libel published of a person in regard to any illegal vocation he is following;⁶ nor for a wrong suffered in a matter about which the plaintiff was attempting a fraud on the public;⁶ nor to recover back money lost in an unlawful game or wager;⁷ nor to enforce a contract or other supposed right founded on a violation of a statute,⁸ or of the common law;⁹ nor to recover the rent of a house which the plaintiff has let to be used for

Hyatt v. Wood, 4 Johns. 150; *Roby v. West*, 4 N. H. 285; *Freeman v. Sedgwick*, 6 Gill, 28.

¹ *Washburn v. Tracy*, 2 D. Chip. 128; *Smith v. Smith*, 2 Pick. 621; *Butterfield v. Forrester*, 11 East, 60; *Flower v. Adam*, 2 Taunt. 314; *Lane v. Crombie*, 12 Pick. 177; *Harlow v. Humiston*, 6 Cow. 189; *Owen v. Hudson River Railroad*, 2 Bosw. 374. And see *Wood v. Waterville*, 4 Mass. 422.

² *Addison on Contracts*, 202; *Boone v. Missouri Iron Co.* 17 How. U. S. 340; *Prothro v. Smith*, 6 Rich. Eq. 324.

³ *Paul v. Frazier*, 3 Mass. 71; *Hamilton v. Lomax*, 26 Barb. 615.

⁴ *Wilbur v. Williams*, 8 Law Reporter, 439. The exceptions reported to have been taken were afterward abandoned.

⁵ *Hunt v. Bell*, 1 Bing. 1; *Manning v. Clement*, 7 Bing. 362.

⁶ *De Wurtz v. Hendricks*, 2 Bing. 314.

⁷ *Perkins v. Eaton*, 3 N. H. 152; *McCullum v. Gourlay*, 8 Johns. 147; *Hawson v. Hancock*, 8 T. R. 575; *Vandyck v. Hewitt*, 1 East, 96. And see *Spaulding v. Bank of Muskingum*, 12 Ohio, 544; *Morgan v. Groff*, 5 Denio, 364; *Bonner v. Montgomery*, 9 B. Monr. 123; *McKinney v. Pope*, 3 B. Monr. 93; *Lyle v. Lindsey*, 5 B. Monr. 123.

⁸ *Booth v. Hodgson*, 6 T. R. 405; *Bancroft v. Dumas*, 21 Vt. 456; *Fales v. Mayberry*, 2 Gallis. 560; *Willinck v. Davis*, Harper, 260.

⁹ *Den v. Moore*, 2 Southard, 470.

purposes of prostitution.¹ If a man negligently so leaves his own land, upon which the cattle of his neighbor are in the habit of trespassing, that they die in consequence of a repetition of the trespass; as, if he leaves maple syrup in his uninclosed woods, and they are killed in drinking it,² or carelessly digs a pit, and they fall into it;³ the owner of the cattle can maintain no action, because they were wrongfully on the premises.

§ 76 [389]. While the several propositions embraced within the last section, and the cases cited in the notes to sustain them, depend, in some aspects, on principles differing from one another, still they are all illustrative of one and the same universal rule of right, pervading all our law. And according to this rule, it is incompetent for one of the parties to a marriage to come into court and complain of the other's violation of matrimonial duties, if himself guilty likewise. When the defendant sets up such violation, in answer to the plaintiff's suit, this is called, in the matrimonial law, recrimination. It was a cardinal doctrine in the Mosaic law of marriage and divorce;⁴ it was transplanted from the Roman and canon⁵ into the common law; and it has found in the latter a congenial soil. "The doctrine," observes Lord Stowell, "has its foundation in reason and propriety. It would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury, when he is open to a charge of the same nature. It is not unfit, if he who is the guardian of the purity of his own house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has first violated his marriage vow, should be barred of his remedy; the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual

¹ *Girardy v. Richardson*, 1 Esp. 13.

² *Bush v. Brainard*, 1 Cow. 78.

³ *Blyth v. Topham*, Cro. Jac. 158.

⁴ *Deut.* xxii. 13-19.

⁵ *Proctor v. Proctor*, 2 Hag. Con. 292, 297; *Beeby v. Beeby*, *supra*; *Leicester's case*, cited 1 Hag. Con. 148.

guilt.”¹ Such parties are “suitable and proper companions for each other.”² Yet according to the doctrine itself, if, in England, both the husband and the wife have committed adultery, and have separated, neither of the parties can maintain against the other a suit for the restitution of conjugal rights.³

§ 77. Let us examine this subject in the following order: I. A General View of the Doctrine; II. Particular Propositions; III. The Effect of Condonation on the Recriminatory Fact; IV. The Distinction between the Law and the Evidence; V. The Evidence.

I. *A General View of the Doctrine.*

§ 78 [389 b]. From what has already been said, the following definition of the law of recrimination may appear just; namely, that it is a bar to the matrimonial suit resting on the fact of the complainant's being in like guilt with the one of whom he complains. This definition, however, is not precisely exact in itself; neither, especially, is its application in the cases arising, always easy. For, though “like guilt,” in the plaintiff, should plainly deprive him of any advantage by reason of the defendant's guilt, yet, — What is like guilt? Let us, therefore, while suffering the foregoing definition to stand, as expressive of so much of the law as is universally accepted among us, see if another definition cannot be found, more complete in its proportions than the former, and embodying more exactly the legal truth as it is received and explained in these volumes. Recrimination, therefore, is the defence which consists in showing, that the complainant in a divorce cause has himself broken, either completely or in part,

¹ *Beeby v. Beeby*, 1 Hag. Ec. 789, 790, 3 Eng. Ec. 338, 339. See 2 Greenl. Ev. § 52; *Mattox v. Mattox*, 2 Ohio, 233.

² Chancellor Walworth, in *Wood v. Wood*, 2 Paige, 108, 111.

³ *Hope v. Hope*, 1 Swab. & T. 94; *Grovier v. Hancock*, 6 T. R. 603. See Vol. I. § 771, 806.

the same chain matrimonial of whose breach by the other party he complains.

§ 79 [390]. In France, formerly at least, the doctrine of recrimination was unknown; but the obvious reason is said to be, that adultery in the husband was not, like adultery in the wife, a legal ground for separation.¹ Into Scotland, as into England, the doctrine was imported from the Roman and canon laws, and it prevailed down to a late period; but, at last, the Scotch courts refused to recognize it, except as the foundation for a cross-suit. When a cross-suit is in Scotland brought, a decree will not be pronounced in the first one, until both suits are ripe for judgment; unless in cases of unnecessary delay. If both parties show themselves entitled to a divorce, the court will, on demand of either, order the decree to be entered. Substantially, therefore, recrimination is now no bar to a divorce in Scotland, "though mutual guilt may affect patrimonial consequences."² In this conflict of opinion abroad, in respect even to the utility of the doctrine itself, it is not strange that the American judges have not been entirely harmonious in defining its limitations, in the jurisprudence of this country.

§ 80 [391]. In the midst of the judicial differences on this subject, we find one point at which the common law authorities, English and American, are agreed. It is, that, whenever plaintiff and defendant are both guilty of adultery, whichever adultery was the first committed, even though the recriminatory fact followed the separation which took place on the discovery of the offence relied on for the divorce, the suit is barred.³ It has also been held, and it is little questioned, that a single act of adultery is sufficient in bar, what-

¹ Lord Stowell, in *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360.

² 1 Fras. Dom. Rel. 672.

³ *Proctor v. Proctor*, 2 Hag. Con. 292; *Brisco v. Brisco*, 2 Add. Ec. 259, 2 Eng. Ec. 294; *Poynter Mar. & Div.* 222; *Smith v. Smith*, 4 Paige, 432; *Mattox v. Mattox*, 2 Ohio, 233; *Christianberry v. Christianberry*, 3 Blackf. 202; *Wood v. Wood*, 2 Paige, 108; 2 Kent. Com. 99.

ever the extent of guilt on the other side.¹ When, moreover, we look after the modern English law, we find some further points to be settled in England at present; but how they stood there at the time the common law of England was received by us, as our inheritance from the mother country, may be doubtful. Thus, it is the established English rule, at least in modern times, that cruelty cannot be pleaded in bar to a charge of adultery.² Yet the converse has not been laid down; namely, that, when a wife has brought her suit on the ground of cruelty, the husband cannot defend it by showing her adultery;³ indeed it appears that he can, even in England;⁴ while, in this country, it has been distinctly decided that adultery is a good bar of a divorce suit from bed and board for cruelty,⁵ especially if the adultery occurred before the cruelty was inflicted.⁶ It may be observed, that, in the States where this has been so held, adultery is a cause of divorce from the bond of matrimony. And, to return to the English law, a late writer says, "it may seriously be doubted, whether a recrimination of cruelty is a good plea in answer to a suit charging the same offence."⁷

¹ *Astley v. Astley*, 1 Hag. Ec. 714, 3 Eng. Ec. 303, 307; 2 Greenl. Ev. § 52.

² *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 176; *Cocksedge v. Cocksedge*, 1 Robertson, 90; *Scrivener v. Scrivener*, cited 1 Robertson, 92; *Eldred v. Eldred*, 2 Curt. Ec. 376, 7 Eng. Ec. 144; *Chettle v. Chettle*, 3 Phillim. 507. Though, in the English courts, cruelty alone is not pleadable in bar of a suit for adultery, it may be joined with a plea of adultery, on the ground that proof of it aids the proof of the adultery. *Cocksedge v. Cocksedge*, *supra*; *Arkley v. Arkley*, 3 Phillim. 500, 1 Eng. Ec. 461; *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360; *Eldred v. Eldred*, *supra*. Neither can the defendant wife set up the sole plea of cruelty for the purpose of asking a divorce for it, if the husband should fail in proving his charge of adultery. *Scrivener v. Scrivener*, cited 1 Robertson, 92. And query, whether, where in answer to a suit for adultery the wife pleads both adultery and cruelty, and the adultery is not proved on either side, but the cruelty is proved, she can then have a decree of divorce for the cruelty. *Cocksedge v. Cocksedge*, *supra*.

³ *Dillon v. Dillon*, 3 Curt. Ec. 86,¹ 7 Eng. Ec. 377, 380. See *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158, 171.

⁴ *Watkins v. Watkins*, 2 Atk. 96.

⁵ *Holmes v. Holmes*, Walk. Missis. 474; *Johns v. Johns*, 29 Ga. 718. But see observation of Chancellor Walworth, in *Smith v. Smith*, 4 Paige, 92.

⁶ *Bedell v. Bedell*, 1 Johns. Ch. 604.

⁷ Brandt Div. 87.

§ 81. The exposition of English doctrine contained in the last section refers to the time when, in England, there were no judicial dissolutions of valid marriages, and divorces from bed and board were only for the two causes of adultery and cruelty. This state of the English law corresponds to nothing which is or has at any time been known in our States generally. When, in England, jurisdiction to dissolve the vinculum of the marriage was given to the Divorce and Matrimonial Court, it was provided as follows: "In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents [that is, either with the wife, supposing the husband to be the complainant, or with the *particeps criminis* in the wife's adultery], then the court shall pronounce a decree declaring the marriage to be dissolved: Provided always, that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery."¹ A distinction, therefore, is made between the matters of defence mentioned in the body of this statute, and those mentioned in the proviso; the former being absolute in bar, and the latter operating as a bar or not, according as the court may deem it just in the particular case to direct.

§ 82. In a suit for cruelty, instituted by a wife against her husband since this statute went into operation, — a matter,

¹ Stat. 20 & 21 Vict. c. 85, § 31.

however, not coming within the terms of the statute, since the divorce for this cause is now, as formerly, only from bed and board, — Sir C. Cresswell held, that the adultery of the wife was a plea sufficient in bar. And he observed: “I think that a wife guilty of adultery cannot be a petitioner in this court on the ground of any matrimonial offence of the husband.”¹ There have not been many decided cases falling directly within this statutory provision; still it seems, that ordinarily the divorce from the bond of matrimony for adultery will not be granted where the party complaining has been guilty of the less offence of cruelty.² But in one case, where the husband sued for a divorce *a vinculo* on the ground of the wife’s adultery, and she set up his cruelty in bar, and the jury found that the two were severally guilty of the particular offence charged, the court, under the particular circumstances appearing, granted him the divorce prayed. Said Cresswell, J., speaking for the whole court: “The court has now to exercise the discretion given it by the 31st section. If there were reason to believe that the misconduct of the wife had been caused by the misconduct of the husband, it would have exercised that discretion by refusing a decree for dissolution of marriage; but it rather appears that the wife’s drunken habits were the cause of the cruelty of which the jury have found the husband guilty. We think, under these circumstances, that we ought to make a decree for dissolution of the marriage.”³

II. *Particular Propositions.*

§ 83 [392]. Looking at the English law, as imported by our forefathers into this country, we should remember, what has already been mentioned, that it allowed no dissolutions

¹ *Drummond v. Drummond*, 2 Swab. & T. 269, 274.

² *Ratcliff v. Ratcliff*, 1 Swab. & T. 467, 473. And see *Haswell v. Haswell*, 1 Swab. & T. 502; *Hope v. Hope*, 1 Swab. & T. 94, as to which see post, § 86, note.

³ *Pearman v. Pearman*, 1 Swab. & T. 601, 602.

whatever of marriages originally valid, and that so its doctrines became established as applying only to divorces from bed and board. But when the divorce sought is from the bond of matrimony, perhaps reasons not applicable when it is from bed and board should influence the tribunal; as they seem, under the recent English statute, to have done the English tribunal. Therefore the questions of difficulty in this country are, First, Whether, in the single State or two in which the law is here as it used to be in England, the English rule, which refuses to receive a plea of cruelty as a sufficient recriminatory answer to a charge of adultery, shall be followed; Secondly, Whether, where the divorce is from the bond of matrimony, for cause made sufficient by statute, be it adultery or any other, the defendant can plead, in recrimination, any matrimonial offence which is ground only for separation from bed and board; Thirdly, Whether, when several offences, — such as adultery, cruelty, desertion, and the like, — are each made by statute cause for divorce from the bond of matrimony, a plea of any one of them will be good in bar of a suit founded on any other of them. Let us examine the matter in the order thus presented.

§ 84 [393]. First. *Where the divorce is from bed and board, grantable only for adultery or cruelty, the same as formerly in England, is the former English rule, which refuses to make cruelty a bar to the divorce for adultery, to be followed?* No evidence appears, satisfying the writer, that the rule mentioned as the English one was established in England previous to the emigration of our forefathers to this country; and, if it was not, the authorities from the English books are not binding here. The doctrine of recrimination is laid down by Ayliffe, referring to two decretals, or, in the language of our own law, decisions, of Pope Gregory IX.;¹ in the first of which it was simply held, that a plaintiff who has committed adultery cannot have a divorce by reason of the defendant's adultery; and, in the second, that, where a separation from

¹ Lib. 4, tit. 19, c. 4 & 5, Corp. Jur. Can. p. 221 of the Decretals.

bed and board has been had on the ground of adultery, it shall be vacated, and the parties ordered to return to cohabitation, if afterward the complainant himself commits adultery.¹ And Ayliffe proceeds to say, that, "since there are some misdemeanors that are taken away by mutual compensation, of which adultery is one, a compensation may be made of this crime; for it is unjust for one person to judge of another, and not give another leave to judge of himself."² Oughton states the doctrine thus: *Compensatio criminis est, si pars rea probaverit partem agentem etiam adulterium commississe absolvenda est pars rea, quoad petita in libello partis agentis.*³

§ 85 [394]. But this statement goes no further than to confirm the universally received doctrine, that adultery may be set up in bar of a divorce suit for adultery. And it was applied, in the ecclesiastical law, only in the civil suit, that is, only in the divorce suit, not in the criminal, for the punishment of the adultery. "Where," said Lord Stowell, "a wife is prosecuted criminally for adultery, not for divorce, but *ad publicam vindictam*," the adultery of the husband "cannot be pleaded; for there the public, not the husband, is the injured party, and it can be no excuse for the wife's breach of the good order of society that her husband had done so before her, whatever it might be in a mere civil prosecution, instituted by himself."⁴ But the first trace of judicial opinion, as seen in the reports, upon the further question, whether cruelty will bar a divorce suit for adultery, appears to be in some observations, which, in 1790, this learned judge made in the same case, as follows: "A third plea of defence offered, but with less effect, is, that his treatment of his wife was, as it really appears to have been, marked with unkindness and disaffection. I say with less effect, because if the course of

¹ Sanchez states the doctrine of recrimination to be, "*Quia alter conjux est ejusdem criminis particeps, aut pariter adulterans; aut adulterio alterius præbens.*" *De Divortio*, lib. 10, disp. 5.

² Ayl. Parer. 226.

³ Oughton, tit. 214.

⁴ And see, for illustrative matter, 1 Bishop Crim. Law, § 340, 341.

unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this court for the protection of a separation by reason of cruelty. And if the ill treatment is not of that gross kind against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction.”¹ And two years subsequently, in another case, he observed: “Indifference, ill behavior, or cruelty is not pleadable in a suit for adultery;” that is, in bar of the suit. “*It will not justify her criminal misconduct.*”²

§ 86 [395]. Passing down the line of time, we come next, in 1810, to the case of *Chambers v. Chambers*; and here we find, from the same accomplished judge, a dictum which has been the basis of all subsequent judicial determination upon this point. It is material, as not only showing upon what reasons the present English rule is placed by the courts; but also as showing, that this first judicial expounder or promulgator of it, who probably knew more of what had gone before than almost any other ecclesiastical judge, did not consider it then settled on authority. He said: “On this plea, the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty? I am inclined to think that she would not. It is certain, that the wife has a right to say, ‘you shall not have a sentence against me for adultery, if you are guilty of the same offence yourself.’ The received doctrine of compensation would have that effect, because both parties are in *eodem delicto*; but this is not so in recrimination of cruelty; the delictum is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know that she would be barred by a recrimination of that species; for the consideration would be very different;

¹ *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360, 361.

² *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28, 30.

the court might not oblige her to cohabitation, which would be dangerous. Here the husband is a *prior petens* in a suit of adultery, and I take the general doctrine to be, that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed."¹ Upon this Dr. Lushington has observed: "I candidly say, I entertain doubts whether the reason given is the most satisfactory that could be adduced; because, if this effect arises out of the difference in the nature of the two offences, it follows, *et converso*, that, where the wife has brought a suit on account of cruelty, the husband cannot plead her adultery in bar, a proposition which I am not aware has ever been laid down in these courts."² But in a later case he seems to have yielded to this reasoning of Lord Stowell.³

§ 87 [396]. Now it has been held, apparently with great propriety, in Missouri, that the court cannot distinguish between different matrimonial offences, to which the law attaches the same consequence.⁴ It would therefore seem to follow, as in the Missouri case⁵ it was substantially adjudged, that adultery and cruelty are, within the principle upon which recrimination proceeds, *idem delictum*. And the very obvious truth, that the husband's cruelty cannot justify the wife's adultery, can have no bearing; because his adultery, which it is admitted she may plead in recrimination, can no more than his cruelty justify her adultery; and because the

¹ *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 451.

² *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 380; ante, § 80.

³ *Cocksedge v. Cocksedge*, 1 Robertson, 90, 92.

⁴ *Neagle v. Neagle*, 12 Misso. 53, reaffirmed in *Duncan v. Duncan*, 12 Misso. 157. So, in a California case it was observed by Field, J.: "In this State, the statute has specified certain acts or conduct which shall constitute grounds of divorce, and so far as the matrimonial contract is concerned, the Courts can not distinguish between them, whatever difference there may be in a moral point of view. The several offences must, therefore, be held equally pleadable in bar to the suit for divorce — the one to the other, within the principle of the doctrine of recrimination." *Conant v. Conant*, 10 Cal. 249, 256. But see *Lovett v. Lovett*, 11 Ala. 763. And see post, § 95.

⁵ *Neagle v. Neagle*, supra.

question of her justification does not arise, until it is first determined whether he is himself entitled to ask the aid of the court. The matrimonial relation is one of mutual dependence and duty; and it would seem to be within all legal analogies, and all sound canons of morality, to refuse to hear a plaintiff complaining of the defendant's infraction of one of the links of this common chain, when he had equally broken another. Moreover the law is for the assistance of those who obey it, not those who violate it;¹ and, when two parties are both in the same wrong, the court helps neither.² Three distinct queries, therefore, arise,— first, whether the principle here suggested is not that upon which the before-mentioned decretals of Gregory IX.³ proceeded, and the true canon law.⁴ Secondly, if it is not, whether, when the doctrine is engrafted upon our jurisprudence, it should not assume this shape, agreeably to the genius and spirit of the common law;—the same as a foreign word, introduced into our language, takes the English form. Thirdly, whether the common law itself, by its own power and reasons, without any extrinsic aid, does not necessarily sustain this view; even, if need be,

¹ See *Christianberry v. Christianberry*, 3 Blackf. 202; *Rhame v. Rhame*, 1 McCord's Ch. 197, 202; *Mattox v. Mattox*, 2 Ohio, 233.

² Ante, § 75. A late English case, as we have already observed, ante, § 76, decides, that, where a husband and wife have both committed adultery, and are living separate, neither party can maintain a suit against the other for the restitution of conjugal rights. Cresswell, J., in giving judgment said, among other things: "I cannot but think, that, as far as public morals and the interests of society are concerned, it would be better to act upon the suggestion, not say the opinion, thrown out by Lord Stowell in *Beeby v. Beeby* [1 Hag. Ec. 789], that a party guilty of a breach of the marriage vow should not have the assistance of the court to enforce any marital right." *Hope v. Hope*, 1 Swab. & T. 94, 106, 107. If this broad doctrine were indeed fully established, it would relieve this branch of the matrimonial law from much embarrassment; and probably promote, on the whole, substantial justice between litigants.

³ Ante, § 84.

⁴ According to the prevailing opinion of the canonists, heresy, called in the canon law spiritual adultery, might be shown in bar of a suit for carnal adultery; though Sanchez does not like the rule. But carnal adultery would not bar a divorce suit founded on spiritual adultery; because the latter was the greater offence, and because it would endanger the soul of one of the spiritually faithful, carnally an adulterer, to dwell in matrimony with a heretic. Sanchez, lib. 10, dis. 16.

against the weight of the canon law, as well as of the present ecclesiastical law of England. These queries are merely stated, not to be discussed here.

§ 88 [397]. Some allowance, however, should be made for human frailty; and it would be unreasonable to require the matrimonial conduct of the plaintiff to be quite without blemish, as the condition on which alone he could be permitted to carry on his suit for the defendant's greater wrong. But precisely where the line between the sufficient and the insufficient should be drawn, may, as matter of theory, be a question of some difficulty. Indeed on strict principle, the bar should probably take place in all cases in which either the plaintiff has been unrepentantly guilty of what in the last chapter was termed conjugal unkindness;¹ or guilty of conduct, which, in view of the frailty of human nature, should render it necessary for the other party to cease the cohabitation. But this rule would be found difficult of application; therefore, following analogies to various propositions which have been discussed in earlier parts of these volumes,² the rule should be, that the misbehavior of the plaintiff, to be an absolute bar, must be of a nature to render it a sufficient legal foundation for, at least, a judicial separation. But as only the two offences of adultery and cruelty were by the former English law sufficient for divorce, the operation of the rule sometimes compelled the judges to pronounce for the separation under the consciousness that it would have an evil and immoral tendency. Thus Lord Stowell, in a case where there was much blame on the part of the complaining husband, employed language which afterward found an echo in the clear understanding and strong moral sentiment of Dr. Lushington, as follows: "In pronouncing for a separation, I feel that I shall tolerate a negligent inattention to marital duty; and that I shall pronounce a decree that will not lead to the

¹ Ante, § 53 et seq.

² Vol. I. § 569, 790, 795 et seq.

peace and honor of families, nor the purity of private life.”¹ And in refusing under this rule to allow the utter and wilful desertion, by the complaining husband, of his wife, to be a bar to his remedy of divorce for her subsequent adultery,² the latter of these distinguished judges employed the following language: “She, a girl of nineteen, of great personal beauty (as stated by all the witnesses), recently married, is at once left, I will not say to the risk, but almost to the certainty, of destruction. To the wife, this marriage, followed up by a divorce, leaving her without any claim to maintenance, has proved utter ruin. I do not extenuate her guilt; but I cannot forget the situation of a young married woman, thus suddenly separated from her husband. To the husband, the consequences have been some expense, some trouble, exile from home during the period he has been in India (where the

¹ *Moorsom v. Moorsom*, 3 Hag. Ec. 67, 117, 5 Eng. Ec. 28, 42; *Phillips v. Phillips*, 1 Robertson, 144, 164.

² One cannot but feel a peculiar embarrassment in attempting to state the conclusions to which the ecclesiastical courts have arrived; when, after reading the cases cited to this section, and other cases of a kindred tenor and spirit, he alights upon the following period, from a decision of Sir Herbert Jenner Fust (*Clowes v. Clowes*, 9 Jur. 356, 4 Notes Cas. 12), made, after the other decisions here referred to, in the year 1845: “The question of malicious desertion,” he said, “is one which has frequently been adverted to in these courts, but has never yet received an absolute decision, whether it be a ground of bar to a divorce.” This learned judge, however, distinguishes between “malicious” and “wilful” desertion; and says, that the case of *Morgan v. Morgan* “could not be carried beyond the wilful desertion.” The distinction is very nice; it is also unusual, at least in this country. In Pennsylvania it has been considered, that the word *maliciously* is an equivalent for the word *wilfully* in an indictment for arson. *Chapman v. Commonwealth*, 5 Whart. 427. And see *Butler v. Butler*, 1 Parsons, 329. In Scotland, where “malicious desertion” is cause for divorce, no other effect seems to be given the word “malicious” than as referring to the intent in the mind to desert; which idea would be equally well expressed by the word “wilful,” or by the word “desertion” alone, without either adjective. See 1 Fras. Dom. Rel. 682, 685. In *Beeby v. Beeby*, 1 Hag. Con. 142, note, 4 Eng. Ec. 358, the court observed: “Separation is not considered by the ecclesiastical court as a bar to divorce for adultery, either previous or subsequent to the act alleged. It is not an answer to such a charge, even in cases of malicious desertion.” And see *s. p. Forster v. Forster*, 1 Hag. Con. 144, 154, 4 Eng. Ec. 358, 364. See also *Grant v. Grant*, 10 Jur. 103. In a late Tennessee case, however, the court seems to have given the word “malicious,” as used in the statute, a meaning similar to what lay in the mind of Sir Herbert Jenner Fust. *Stewart v. Stewart*, 2 Swan, Tenn.-591; Vol. I. § 775.

wife has had no means of watching his conduct), and a judgment in this court; by which, if it decrees a divorce, he will be absolved from all legal obligation of maintaining his wife; and, it may be, an act of the legislature dissolving the marriage. That such an example can be otherwise than prejudicial to public morals, cannot for a moment be stated.”¹

§ 89 [398]. But it is well settled in England, as far as judicial dicta can alone establish such a point, that, where adultery is pleaded by way of recrimination merely, it is not necessary to prove such strong facts as would be requisite to convict on a direct proceeding for divorce. The reason assigned is, that the party who enters the court with a criminal imputation on the other, must purge his own conduct of all reasonable imputation of the same sort.² And though it might seem, from observations in one of the cases, that solicitations of chastity, coming short of the very act, are sufficient in recrimination,³ yet this has been doubted;⁴ and it is clearly laid down, that a defendant who sets up the plaintiff's adultery must prove it, to make good his bar.⁵ Since a plaintiff, who relies on the defendant's adultery, is obliged to do no more than prove his case, there would ap-

¹ *Morgan v. Morgan*, 2 Curt. Ec. 679, 7 Eng. Ec. 254, 259, 25 Leg. Obs. 18. And see the observations of Chancellor Walworth, in *Peckford v. Peckford*, 1 Paige, 274. But see *Reeves v. Reeves*, 2 Phillim. 125, 1 Eng. Ec. 208, and *Sullivan v. Sullivan*, 2 Add. Ec. 299, 2 Eng. Ec. 314, where Sir John Nicholl expressed somewhat different apprehensions of the moral consequences. The North Carolina court has held, that, if a wife, without legal cause, leaves her husband, and refuses to live with him, she cannot have a divorce from the bond of matrimony for his subsequent adultery. *Foy v. Foy*, 13 Ire. 90. See also *Harper v. Harper*, 29 Miss. 301; *Thomas v. Tailleu*, 13 La. An. 127; *Conant v. Conant*, 10 Cal. 249; *Holston v. Holston*, 23 Ala. 777. See post, § 90 and note.

² *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 363; *Astley v. Astley*, 1 Hag. Ec. 714, 3 Eng. Ec. 303, 306.

³ *Forster v. Forster*, supra.

⁴ *Chetile v. Chetile*, 3 Phillim. 607.

⁵ *Stone v. Stone*, 3 Notes Cas. 278; *Goodall v. Goodall*, 2 Lee, 384. “It must be manifest, that, if once the guilt of the husband be established, the *onus probandi* shifts; and, if he seeks to deprive her of her remedy by imputing a charge of criminality of any kind, he should make good that charge by evidence which admits of no dispute.” Dr. Lushington, in *Turton v. Turton*, 3 Hag. Ec. 338, 350, 5 Eng. Ec. 130, 136.

pear to be little scope for this distinction. And indeed, the Judge Ordinary presiding in the English matrimonial court recently before the time this fourth edition of this book is published, seems to have utterly discarded this distinction.¹

§ 90 [399]. Secondly. *Where the divorce is from the bond of matrimony, will any conduct in the plaintiff, made by law foundation for only the limited divorce, bar the suit?* The answer to this question depends much on the reasons, and somewhat on the authorities, brought forward under our first inquiry; so the reader is requested to consult them. But supposing those reasons not to be conclusive of the point there discussed, still they may lead to the consequence, that these minor offences shall bar the suit for divorce from the bond of matrimony. For a distinction has been taken, both in England and the United States, as to the two kinds of divorce. Thus we have already seen, that, in England, such a distinction exists under the present English divorce statutes, as expounded by the courts.² And in earlier times Sir John Nicholl, in one case, observed: "Whether such a husband, morose, severe, inattentive, negligent, should be entitled to a special legislative interference, dissolving the marriage, and enabling him to marry again, is quite a different question, and rests upon very different principles; but his conduct does not amount to a legal bar to a sentence *a mensâ et thoro*."³ And it has been held in this country, that, where the divorce sought is from the bond of matrimony, the English authorities in respect to divorces from bed and board are not in point. Because, on an application for the limited divorce, there may be reasons in favor of granting it, as to save a husband from being charged with a spurious issue, or the supporting of an adulterous wife, which would be over-

¹ *Sopwith v. Sopwith*, 2 Swab. & T. 160, 164 et seq. "It is certainly," he says in this case, "a startling proposition, that, if an issue be joined as to the same identical fact, a different amount of evidence is necessary to sustain the issue according as the averment of that fact is made by the plaintiff or defendant."

² *Ante*, § 81, 82.

³ *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13, 21.

balanced by other reasons, if the divorce were from the bond of matrimony. Dissolutions of the marriage have reference to a second marriage; and he who would ask this privilege should have himself discharged properly the duties of the first.¹

§ 91 [400]. The English parliament, in its late course of granting divorce bills dissolving the marriage, though bound by no law but its own pleasure, had still an established practice which had "become as much the law of parliament as the practice of the courts below constitutes the law of those courts."² According to this unwritten parliamentary law, on a petition charging adultery, not only might adultery be set up in recrimination;³ but plainly cruelty might be also, though no exact decision on this point is now before the author. But where a husband had lived separate from his wife for many years, without making any provision for her, being able; the House of Lords refused to grant him a

¹ *Wood v. Wood*, 5 Ire. 674. See also *Moss v. Moss*, 2 Ire. 55; *Foy v. Foy*, 13 Ire. 90; *Whittington v. Whittington*, 2 Dev. & Bat. 64. In the case last cited, Ruffin, C. J., says: "The divorce from the bonds of matrimony is not to be granted merely because one or both of the parties wish it. It ought to be granted only in the extreme case where the conduct of one party is such that they ought not to, and cannot, live together; and the other party has been, and was, up to the time of the conduct complained of, willing and ready, and proceeding in the performance of the duties appropriate to that party." These North Carolina decisions may have received a certain tinge from the statute of that State, which authorizes the court, in some circumstances, to grant a divorce from the bond of matrimony, or from bed and board, at discretion. And see *Conant v. Conant*, 10 Cal. 249. Vice-Chancellor McCoun once observed: "I am convinced it is the duty of this court to hold a strict hand over the proceedings, and not to grant a decree which is to absolve" the parties "from their marriage vows, except where the complaining party is entirely innocent, and is really aggrieved by the misconduct of the other, and seeks the relief which the law affords from a sincere desire to avoid a greater shame." *Hanks v. Hanks*, 3 Edw. Ch. 469. See also *Christianberry v. Christianberry*, 3 Blackf. 202; *Ryan v. Ryan*, 9 Miss. 539. In *Sloan v. Cox*, 4 Hayw. 75, it was substantially stated, in the opinion of the Court, that a divorce from bed and board is no bar to the defendant's right to bring a suit against the plaintiff for divorce from the bond of matrimony, on the ground of adultery afterward committed. But this was not the point in issue.

² Lord Brougham, in *Moffat's case*, *Macqueen H. L. Pract.* 658.

³ *Bland's case*, *ib.* 605.

divorce, notwithstanding the evidence showed her to be a common prostitute; because he had neglected her, cast her upon the world without caring what became of her, and allowed her nothing for her support.¹

§ 92 [400 a]. The matters to be brought forward under our third inquiry will shed further light on the present subject. There is an Illinois case, being a suit for divorce from the bond of matrimony for cruelty, wherein the jury found the allegations of the plaintiff wife to be true, except the allegation in which she claimed to have been a dutiful wife; but the court held her nevertheless to be entitled to the

¹ *Simmons's Divorce bill*, 12 Cl. & F. 339. In the recent *Batley divorce case*, a newspaper report only of which I have seen, "the Lord Chancellor, at the conclusion of the evidence, said, this was a case in which he felt it to be his duty to move that the second reading of the bill be postponed, to allow the house time for further consideration. There was no evidence whatever to affect the wife's character previous to her marriage. Then, with respect to the alleged deception [with regard to her parentage] which had been practised, it must be, in the first place, remarked, that Batley had been guilty of deception towards her, in representing, when they were married, that he was of full age, when it was shown that he was a minor. He had married her with a full knowledge of her mode of life and means of livelihood. [She had supported herself before marriage by needle-work.] He had been a visitor at the house; and had, therefore, the means of ascertaining her character previous to the marriage. He (the Lord Chancellor) was not going to justify the subsequent conduct of the woman—for it could not be justified—but what were the probable consequences of the desertion of the wife by her husband, but those which had followed? Deserted by her husband, she is compelled to apply to a magistrate, who makes an order for an allowance of 7s. a week. She received, therefore, only a shilling a day from the man for whom she had given up her business, throwing herself out of employment, and the means of obtaining an honest livelihood, to place herself under the protection of a husband, who, for reasons wholly unsupported by evidence, deserted her at the end of one short week. The motion for the postponement of the second reading of the bill was then agreed to, and the house adjourned." In another case the application for divorce was refused; the Lord Chancellor, Truro, observing, that "the husband had left his wife at a period when, according to the evidence, he had no reason to suspect her of any guilt or impropriety, and he never looked after her, nor furnished her with any thing beyond these two wretched sums of 5l. each. There was no explanation as to why he had separated from his wife; and when they did separate he ought to have shown some regard for her by taking care that she had means for her support." *Llewelyn's Divorce Bill*, 1 Marq. Scotch Ap. Cas. 280, 282. See ante, § 88.

divorce.¹ This decision is doubtless just; and plainly there may be such ill conduct on the part of the plaintiff as ought not still to bar the suit; while, at least, if the ill conduct has gone far enough to be ground for a divorce from bed and board, the one guilty of this should not prevail, coming thus into court to complain of a little deeper shade of guilt in the other. Yet that this proposition, or any other proposition concerning the matter of our present inquiry, is established in the American law, could not be asserted. It has been held, it would seem very properly, that, where desertion for a specified number of years, and adultery, are severally ground of divorce from the bond of matrimony, the recriminatory plea of desertion is good in bar of a suit for adultery, provided the desertion had existed before the adultery for the requisite number of years, otherwise not.² But we are here running into matters which belong to the next division of our inquiry.

§ 93 [401]. Thirdly. *When the divorce is from the bond of matrimony, if the defendant shows, in recrimination, acts of the plaintiff amounting also to cause for the same divorce, though they may not be, or though they may be, acts under the same name, will they bar the suit?* Plainly, if the author's view of the answer to be given to our second question is correct, this question, *a fortiori*, should also be answered in the affirmative. And besides the considerations mentioned in the foregoing sections, some further ones present themselves here. Thus, if the bar now treated of does not suffice, we have this perplexing state of things, that cross-suits may be brought, both parties may be entitled to prevail; yet, if both do prevail, each is the guilty and each the innocent party, under statute laws which leave to the innocent and to the guilty, after the divorce, different rights, duties, and pecuniary interests; for the statutes of most if not all of our States are such as to give scope to this argument. And this result shows, as

¹ *Thatcher v. Thatcher*, 17 Ill. 66.

² *Hall v. Hall*, 4 Allen, 39; *Dupont v. Dupont*, 10 Iowa, 112. And see post, § 94, 95.

distinctly as though the legislature had used the exact words, that the bar must be good ; since, if it is not good, the statutory provisions concerning these collateral matters can have no effect.¹

§ 94 [402]. Looking after specific authority, we find, besides the point brought out at the close of our section before the last, a case in which — desertion for a specified number of years, and adultery, being severally statutable grounds for divorce — it seems to have been held, that the plaintiff's adultery is a good bar to her suit for the defendant's desertion ;² and we find another case in which, under a similar system of matrimonial laws, it was intimated by the court, on referring to an English decision, that desertion would not bar a proceeding for adultery.³ But an examination of these cases shows, that neither of them should have much weight, in respect to the matter we are discussing ; more especially when we consider, that, after the commission of an act of adultery, desertion, commenced or continued, is justifiable, on a principle different from recrimination.

§ 95 [403]. The statute of Missouri provided, that, in certain cases therein enumerated, the "innocent and injured party" should be entitled to a divorce from the bond of matrimony. It also provided in a separate section, that, when "both parties have been guilty of adultery, then no divorce shall be decreed." Under this statute the courts deny the divorce also, whenever both the parties are guilty of any of the enumerated offences. The learned judge observed, in one case : "It cannot, with reference to the rights of the in-

¹ See also, on this matter, *Cooper v. Cooper*, 7 Ohio, 238 ; *Tarbell*, petitioner, 32 Maine, 589 ; *Dejarnet v. Dejarnet*, 5 Dana, 499.

² *Dunbar v. Dunbar*, Wright, 286. The proceeding was founded on the defendant's desertion, which was clearly proved ; but it appeared also, that the complainant had been living for six or seven years in adultery with a man who was in court, prosecuting the suit. The court dismissed the bill, and ordered the sheriff to take into custody the adulterer, who was bound over to answer criminally for the adultery at the next term of the court. And see Page on Div. 240.

³ *Richardson v. Richardson*, 4 Port. 467, 478.

jured party, be said, that adultery is a more heinous offence, or one of greater moral turpitude, than others enumerated in the act; for the effect of each is the same, as they severally entitle the party injured to a divorce." Again, "the whole act evidently contemplates the innocence of the party obtaining a divorce. With what propriety could the court divorce a husband from his wife, because of desertion on her part, when she had been driven to abandon her home because of the cruel and barbarous treatment of the husband? Or how shall the court determine which is the *innocent and injured party*, where the evidence establishes the fact that the wife has been addicted to habitual drunkenness for the space of two years, and then the husband has been guilty of adultery? Which party has a right to apply to the court to set aside and vacate the marriage contract, when both parties have been guilty of a breach thereof?"¹ In an earlier case, however, under a similar statute, the Supreme Court of Pennsylvania, it would seem with questionable propriety, had decided, overruling the Court of Common Pleas, that the specific provision, for recrimination where there was mutual adultery, excluded the general right.² Therefore a plea of adultery was held not to be good in bar of a suit on the ground of desertion. This latter case appears also to be an authority for another point, still more questionable; namely, that desertion, continued for the period prescribed in the statute, is sufficient ground of divorce, although, during the later portion of the period, it was justifiable by reason of the plaintiff having, subsequently to the desertion, committed adultery.³

§ 96 [404]. In Louisiana, the act of April 2, 1832, § 1, provides, "that, whenever a husband or wife, charged with an infamous offence, shall actually have fled from justice, and gone beyond the jurisdiction of the State, the husband

¹ *Nagle v. Nagle*, 12 Misso. 53; *Ryan v. Ryan*, 9 Misso. 539. And see ante, § 87 and note.

² See, as a question of statutory interpretation, 1 Bishop Crim. Law, § 91, 92.

³ *Ristine v. Ristine*, 4 Rawle, 460. See ante, § 92, 94.

or wife of such fugitive may claim a divorce, on procuring proof, to the judge who tries the petition for divorce, that his or her husband or wife has actually been guilty of such infamous offence, and has so fled from justice." And it has been held under this statute, that a wife, guilty of adultery, cannot claim the divorce it provides from her husband, by reason of his having killed in cold blood, the man with whom the adultery was committed, and then having fled from the State.¹

II. *The Effect of Condonation on the Recriminatory Fact.*

§ 97 [405]. On this subject of recrimination, another difficult question remains. It is, whether a condoned offence is available in recrimination.² In *Beeby v. Beeby*, there was an attempt to take off the effect of very aggravated adultery, established in recrimination, by showing a condonation of it. Lord Stowell was of opinion, that the condonation did not sufficiently appear in evidence; or, if it did, that there was subsequent adultery; and, at the same time, his mind leaned strongly to the opinion, that the condonation, if proved, and still in force, would not remove the bar. He observed: "A man, it is true, who has forgiven adultery, cannot bring a suit; but, where he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the court? Does her act bind the court? If both are equally guilty, will her condonation make him *rectus in curia*, and enable him to procure a sentence? There may be cases where a wife may, by forgiveness, by cohabitation, by the reformation of the husband, be so barred that an obsolete fact shall not be a defence.³ It is said, that condonation is favored because it induces the parties to live together again; but here the effect would be to separate them, to shut the door more completely against a

¹ *J. F. C. v. M. E. his wife*, 6 Rob. La. 135.

² *Ante*, § 33.

³ *Ante*, § 61.

return; here, if the court does not pronounce a sentence of separation, is no impossibility of a return.”¹

§ 98 [406.] In a subsequent case, before Dr. Lushington, where the adultery of the defendant wife was of a very profligate nature; and the husband had, many years before, been guilty of a single act of adultery, which she had forgiven; the divorce was granted. And in the course of his opinion, founded however on the special facts of the case,² the learned judge employed language somewhat variant from the foregoing intimations of Lord Stowell. He said: “Where a condonation has taken place, with a full knowledge of the facts, it is said to be a conditional forgiveness. Conditional on what? On the future conduct of the husband. Suppose he fulfils the condition, and never after violates the obligation of the marriage bed, is the condonation to have no other effect than to bar a suit against him? I think the effect is to make him *rectus et integer*, except that his past transgression may be revived by subsequent misconduct.”³

§ 99 [407]. The New York court held, while uncontrolled by statute, that condonation does not necessarily remove the recriminatory bar; and whether it will so operate or not must depend on the particular circumstances of the case.⁴ The Revised Statutes, however, have since established the uniform rule intimated by Dr. Lushington, in providing, that the court may refuse the decree “when it shall be proved, that the complainant has also been guilty of adultery *under such circumstances as would entitle the defendant, if innocent, to a divorce.*”⁵ In New Hampshire, the law has been laid down

¹ *Beeby v. Beeby*, 1 Hag. Ec. 789, 797, 3 Eng. Ec. 338, 342.

² See Vol. I. § 63.

³ *Anichini v. Anichini*, 2 Curt. Ec. 210, 7 Eng. Ec. 85. In a subsequent case, before the new divorce court, Cresswell, J., followed this doctrine of Dr. Lushington. *Seller v. Seller*, 1 Swab. & T. 482. See, however, *Goode v. Goode*, 2 Swab. & T. 253.

⁴ *Wood v. Wood*, 2 Paige, 108; *Morrell v. Morrell*, 1 Barb. 318; s. r. *Goode v. Goode*, *supra*.

⁵ *Morrell v. Morrell*, *supra*. But the court, in a subsequent stage of the same

by the judges the same as it now stands in the New York statute; but without any citation of authorities, or much apparent consideration of the question. It is furthermore observable of the New Hampshire case, that the wife's adultery, which was set up in recrimination, had been committed by the procurement of the husband.¹

§ 100 [407 a]. If we look at this question in the light of principle, we shall be led to the following result: After an offence has been condoned, the guilty one stands upright as to his relations with the other, so long as his own conduct is correct in all particulars; perhaps, even when it is not fully correct. This places the forgiving party under no new liberty of evil doing; but, suppose the condoned offence were to operate as a recriminatory bar, then the forgiving party would have practically obtained a license for himself when he suffered the condonation to pass. And surely any construction of either a common law or a statutory rule, the effect of which is to license profligacy, or other ill conduct in the matrimonial relation, is to be strenuously avoided.

IV. *The Distinction between the Law and the Evidence.*

§ 101. The cases will be few in which any serious difficulty will arise under this head. The foregoing discussions relate almost wholly to the law, in distinction from the evidence; it is a question of law, not of fact, whether a particular act will operate to bar a suit for divorce,—bar the particular suit,—on the ground of recrimination. The jury have only

case, put, without deciding the point, some pertinent queries whether the true construction had been given to the statute. "The circumstances meant," observes Sill, J., "are undoubtedly absence of procurement or connivance, or any thing else which would involve the other party, directly or indirectly, in the guilt of the act. But it seems to us, that condonation and lapse of time (where they have transpired) cannot appropriately, and within the meaning of the statute, be taken as the circumstances under which the party is guilty. They have no connection with the commission of the offence." *Morrell v. Morrell*, 3 Barb. 236, 241.

¹ *Masten v. Masten*, 15 N. H. 159; ante, § 5.

to pass upon the question, whether the act has been committed or not.

V. *The Evidence.*

§ 102 [409]. The plaintiff must so prove his case as not to show at the same time a bar. And when upon his own evidence his guilt appears, he cannot have the remedy he asks.¹

¹ *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22.

CHAPTER VI.

LAPSE OF TIME AND INSINCERITY.

§ 103 [410]. Two principles of natural justice pervade our jurisprudence; the one, that no man shall suffer because of his goodness or his forbearance; the other, that vigilance and care concerning one's own rights shall be rewarded. The effect of these two principles, operating together, must be of necessity somewhat uncertain and indefinite. But in the development of the law, adjudications establish point after point, so that we have some of the consequences of the joint influence of these principles, well settled. The doctrine of the English courts is, that mere delay is not of itself, standing quite alone, sufficient to bar a party's claim to a divorce; while, at the same time, it is always, if the delay is long, to be taken seriously into the account, as tending to establish insincerity in the plaintiff, or his condonation of the offence, or connivance at it; and thus, especially when the husband is plaintiff, indirectly defeat the suit; though, when the wife prosecutes, it can rarely produce this consequence.¹ And where a husband was seeking a divorce for the adultery of his wife, Lord Stowell observed: "The first thing which the court looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, and known by the party; because, if the interval be very long between the date and knowledge of the fact, and the exhibi-

¹ *Ferrers v. Ferrers*, 1 Hag. Con. 130. 4 Eng. Ec. 354, and the cases stated in the notes; *Dysart v. Dysart*, 1 Robertson, 470, 541, 542; *Angle v. Angle*, 1 Robertson, 634, 642; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 334. See *Williamson v. Parisien*, 1 Johns. Ch. 389; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Stokes v. Stokes*, 1 Miss. 320.

tion of them to this court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, ~~at~~ a condonation of it. It therefore demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations."¹ But since the doctrine of condonation,² and the rules of evidence as to connivance,³ do not in all respects apply the same to the wife as to the husband, observations like the foregoing can have little relevancy to a suit promoted by her.⁴

§ 104 [411]. Therefore if a man for a considerable space of time sees his wife living in open adultery, and takes no steps either to prevent it or to obtain a divorce, he is presumed to have forgiven or acquiesced in the past, and to acquiesce also in the present, and he cannot succeed in his suit.⁵ It was so held, where the husband had lain by twenty years, while the wife was living with another man, to whom she was married. And a shorter period would ordinarily suffice.⁶ But for reasons already noticed,⁷ the same presumption would not arise against the wife, whose husband might be living in adultery with another woman.⁸ Yet in New Hampshire, in a case of cruelty, where the acts complained of transpired eight years prior to the institution of the wife's suit, it was deemed necessary some occasion should be shown for the delay.⁹ Let us observe, however, that, if the parties were cohabiting during the interval of delay, it would be

¹ *Mortimer v. Mortimer*, 2 Hag. Con. 310, 4 Eng. Ec. 543, 545.

² *Ante*, § 49-52.

³ *Ante*, § 18.

⁴ See *Angle v. Angle*, 1 Robertson, 634, 640, 641.

⁵ *Ante*, § 22; *Whittington v. Whittington*, 2 Dev. & Bat. 64.

⁶ *Williamson v. Williamson*, 1 Johns. Ch. 488. And see *Valleau v. Valleau*, 6 Paige, 307.

⁷ *Ante*, § 22.

⁸ *Angle v. Angle*, 1 Robertson, 634, 642; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 333.

⁹ *Fellows v. Fellows*, 8 N. H. 160.

difficult to say there was not a condonation;¹ while, if they were not cohabiting, the English doctrine would deduct the interval of non-cohabitation, as against the wife.²

§ 105 [411 a]. In a late Alabama case, a wife was held to be barred, by her great delay, of her suit to have the marriage declared null because of the insanity of her husband when married. Stone, J., said: "These parties were married in 1826. Six years afterwards, in 1832, Mrs. Rawdon had notice that Mr. Rawdon was insane. She slumbered on her known rights twenty-two years, and filed this bill in 1854. Courts of equity, for the peace of society, discourage antiquated and stale demands; and, acting on this inherent doctrine, refuse to interfere where there has been a long acquiescence. . . . Lapse of time is a bar to relief in this case; and the parties, as to the property, must be left to their remedies at law, if they have any."³ By an Alabama statute, when a divorce is sought on the ground of adultery,—the statute does not apply to cruelty,—the suit must be brought "within one year after the discovery of the act charged."⁴

§ 106 [412]. Where there has been a delay which operates, *prima facie*, against the party, he is permitted to explain it. "The principle," says Dr. Lushington, "of this court and of all courts, is, that the husband ought to proceed with such celerity as the case admits of, to obtain the remedy he seeks; but I conceive it is also settled, that, if any circumstances occur which reasonably prevent him from proceeding, he is not thereby debarred from doing so, at a time more convenient to him." And where want of funds had compelled the husband to discontinue his suit against the wife, this learned judge permitted him to carry on a fresh suit on obtaining the means.⁵

¹ Ante, § 38.

² D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 334.

³ Rawdon v. Rawdon, 28 Ala. 565, 568.

⁴ Smedley v. Smedley, 30 Ala. 714, 716.

⁵ Cood v. Cood, 1 Curt. Ec. 755, 6 Eng. Ec. 452, 455; ante, § 104.

§ 107 [414]. In some of the United States,—as in Alabama, already mentioned,¹—there are statutes either expressly or impliedly limiting the period within which, after the discovery of the offence, the suit for divorce must be brought. A statute of this nature operates as an absolute bar.² The knowledge of the offence in the plaintiff's mind is matter to be shown by the defendant who sets up such a statutory bar.³ And in New York, Chancellor Walworth, in construing the statute which fixes the period of limitation at five years after this knowledge, said: "If the complainant knows, that his wife has contracted a second marriage, and continues openly to cohabit with such second husband, or that she is living in open and continued adultery with another person even without the usual form of a marriage, the right to file a bill for a divorce for such adultery will be barred after the expiration of five years; although such cohabitation or adulterous intercourse is continued down to the time of the commencement of the suit. And when such continued adultery is open and notorious, the complainant must also satisfy the court, that, by reason of his absence from the country, or otherwise, he was not aware of the fact of such continued cohabitation and adultery until within five years from the time of the commencement of the suit."⁴ The courts of the same State also apply this statute of limitations to suits of nullity for fraud; although the statute on the latter subject provides, that a marriage may be annulled because the consent of one of the parties was obtained by force or fraud, *during the lifetime of the parties, or one of them*. The meaning is, contemplating the two statutes together, that the suit can only be brought while one of the parties is living, within the period of limitation.⁵

§ 108. The present English statute provides, as we have seen,⁶ that the divorce from the bond of matrimony may be

¹ Ante, § 105.

² *Moulton v. Moulton*, 2 Barb. Ch. 309.

³ *McCafferty v. McCafferty*, 8 Blackf. 218; ante, § 70.

⁴ *Vallean v. Vallean*, 6 Paige, 207.

⁵ *Montgomery v. Montgomery*, 3 Barb Ch. 132.

⁶ Ante, § 81.

refused, in the discretion of the court, when the petitioner shall "have been guilty of unreasonable delay in presenting or prosecuting such petition:" "We think," said Wightman, J., "that the 'delay' intended by the 31st section of the Divorce Act, must be that sort of delay which would show the petitioner to have been insensible to the loss of his wife, and might almost be said to be equivalent to condonation."¹ In another case, which was a suit by the wife for a judicial separation on the ground of cruelty,—not therefore falling, if the point were material, within the provision of the statute,—the Judge Ordinary observed: "I cannot agree that the lapse of time is immaterial; if at the time there had been any serious apprehension of further violence on the part of the husband, I cannot but suppose that means would have been found to claim the protection of the Ecclesiastical Court. Still I have no proof before me of any indirect motive for the present proceeding, and do not by any means treat the lapse of time as a bar." And he granted the prayer of the wife, though the cruelty had been committed in 1848, and the decision was in 1861.²

§ 109. Under the former practice of parliament in granting special divorce bills, it was customary to take into account the delay in applying to parliament, and in taking the preliminary steps; yet, where a reasonable explanation was given for the delay, it was seldom made to operate as a bar. Thus, in one case, where the delay was explained by the poverty of the petitioner, he was permitted to have the divorce though sixteen years had passed since the adultery was committed.³ In another case, the complaining husband had brought promptly his suit for damages and his suit in the Ecclesiastical Court, but permitted five years from the time of the elopement to elapse before he applied to parliament; yet

¹ *Pellow v. Pellow*, 1 Swab. & T. 553. In this case, the delay was held not to be a bar; also in *Tollemache v. Tollemache*, 1 Swab. & T. 557, 561. Contra, in part, as to the result, *Matthews v. Matthews*, 1 Swab. & T. 499.

² *Smallwood v. Smallwood*, 2 Swab. & T. 397, 401.

³ *Martin's Divorce Bill*, 1 H. L. Cas. 79.

the delay was held to be sufficiently accounted for by the absence of the wife in America, and the inability of the husband, by reason of his affliction, to attend to any business.² In connection with the report of the case last mentioned, there is a note in which many cases upon this point are collected. In one, the discovery of the adultery was in August, 1804, and the divorce act was passed in June, 1814. No explanation was given of the delay. In another, the wife was delivered of an illegitimate child in March, 1830, and in the month of October following the husband came to England and inquired into the matter. The act was passed in 1839, and the delay was not accounted for. In another case, the wife's adultery was in 1820, but not known till 1830, when the adulterer was dead. He instituted his suit in the Ecclesiastical Court in 1832; the divorce act by parliament was passed in 1839. There was some evidence of the husband's poverty to account for the delay. In another case, the adultery was in 1829; the divorce act was passed in 1840. There was, in this case also, some evidence of the husband's poverty. In another case, the commission and knowledge of the adultery were in 1829, and the divorce act was passed in 1840. There was evidence of poverty at first; but, in 1832, the poverty had ceased; leaving, it appears, an interval of eight years unexplained. In some of the other cases referred to the delay was less.

§ 110. Out of this doctrine of lapse of time we have thus drawn the doctrine of Insincerity. We shall discuss it still further when we come to consider the particular matter of impotence; for, under the title of Impotence, there are some doctrines relating to this subject of such special application to the particular title, that it will be best to consider them there, rather than here.

§ 111 [414 a]. Yet concerning this doctrine of insincerity; or, rather, the doctrine of a defendant being permitted to go

² Heavyside's Divorce Bill, 12 Cl. & F. 333.

clear when the insincerity, as it is called, of the plaintiff appears; a single observation should be made. When a party comes into court for the purpose of deceiving the tribunal, not for the real purpose of obtaining what in words he asks, he should always be dismissed. An illustration of this proposition occurs where a man wishes to learn the law from the court; and, for this purpose, carries into court a fictitious cause. The rule is familiar, that parties in such circumstances will be dismissed. And if a man, not desiring a divorce from his wife, should bring a suit for divorce against her, for the purpose of giving her trouble, or casting reproach on her reputation, or for any other reason than what appears in the case, he should be sent out of court. What is so far stated is plain. But in reason, suppose a man chose not to avail himself of his legal remedy during the last year, or the last twenty years, yet did not condone the offence, why, if he really, and in good faith, desires now to avail himself of it, should he not be permitted to do so? Of course, if he has long slumbered over his rights, the court should inquire the more diligently whether he has not also remitted them. Yet mere slumbering over rights, or the wakeful attention to them in the mind, while lingering affection holds back the hand from which the blow might fall, ought not, whatever in fact it may sometimes do under judicial rule, to bar the remedy afterward sincerely sought.

§ 112. This matter was somewhat discussed in a late English case, where a wife brought a suit for nullity of marriage, twenty-five years after its celebration, and twenty-one years after cohabitation ceased, on the ground of the husband's impotence. Two judges out of three concurred in rejecting her prayer because of the delay, connected with the other circumstances of the case; the third judge, Bramwell, B., made the following observations, and, as they are particularly connected with the matter now under discussion, they are given here, instead of being reserved for the future chapter: "Here it is suggested, that the petitioner lived with the respondent four years; endeavored to get him to take her

back; has always been willing to go back, and only sues now because he refuses to maintain her; that she is in truth not complaining of the marriage and seeking to get rid of it because it is a grievance to her, but complaining because her husband will not maintain her. I think that is not so; I think these circumstances only show, that she would not complain of the marriage if he would live with her or maintain her; but that, as he will not, she does not only in form but in substance complain of it, and seeks to get rid of what is to her a grievance. It is as though a person took possession of my land, and I forebore to complain as long as he gave me a compensation; when he ceases to do so, I make my true complaint."¹ It seems to the writer plain, that there is no insincerity in any application in which, in good faith, the party applying desires to get rid of the marriage. Suppose the reason is, that a good opportunity for a second marriage has presented itself; or that the applicant can better support herself as a single, than as a married, woman; or that she once had conscientious scruples about taking a divorce, but has none now; or that she expects to inherit property, and wishes the vinculum to be snapped first;—Is there insincerity here? Suppose the applicant were willing to condone the offence, but the other party would not accept the condonation,—we have already seen,² that this willingness is not a condonation in law,—surely, then, it should not be made to bar the right to divorce on any notion of insincerity. In desertion, the case always is, that the complaining party was willing to cohabit with the other; yet, if the doctrine of insincerity is to operate in such circumstances, the complainant can never have the remedy of a divorce, and the statute which authorizes the divorce is a nullity.

¹ H. v. C. 1 Swab. & T. 608, 619.

² Ante, § 47.

BOOK II.

THE LOCALITY OR JURISDICTION WITHIN WHICH SUITS
FOR DIVORCE AND FOR NULLITY OF MARRIAGE ARE
TO BE PROSECUTED.

CHAPTER VII.

SOME GENERAL VIEWS.

§ 113 [712]. THE principal object of this series of chapters is to explain, under what circumstances a judicial tribunal may properly take cognizance of a question of divorce; and under what circumstances, the cognizance having been taken, and a sentence of divorce pronounced, the sentence will be recognized as valid and binding in the tribunals of other States and countries. And the reader perceives, that two distinct inquiries here present themselves; for the fact may be, that the tribunals of a country will grant a divorce under such circumstances as will lead the tribunals of another country to hold it void, for want of a jurisdiction in the former country. Yet a fact like this is greatly to be deprecated; and the courts of every country, both when they decree divorces and when they sit in judgment on foreign divorces, should do whatever they consistently can to establish rules preventive of such a consequence.¹

¹ And see observations of Shaw, C. J., in *Hartean v. Hartean*, 14 Pick. 181, 187.

§ 114 [713]. The tribunals of every country are controlled by the legislative power; and, when lawfully commanded, they take jurisdiction of a question of divorce, though the individual judges believe the jurisdiction to be improper, or even believe the divorce sentence to be without authority under the international law. The sentence, if void abroad, is still valid at home.¹ Yet in a late Rhode Island case, the learned court very properly laid down the doctrine, that, under general words of a statute, it would not undertake to dissolve a marriage between parties so situated that the sentence of dissolution ought not to be held binding, on general principles of law, upon the courts of every other country or State.²

§ 115. The various matters connected with this subject were, in the earlier editions of this work, embraced within a single chapter. In the present edition, it is deemed best to change in some degree the order of the discussion, to add some new matter, and to break into several chapters what before was embraced in one.

¹ See *D'Arcy v. Ketchum*, 11 How. U. S. 165.

² *Ditson v. Ditson*, 4 R. I. 87.

CHAPTER VIII. •

PRELIMINARY INQUIRY CONCERNING THE LAW OF DOMICIL.

§ 116. It is not proposed to enter, in this chapter, into a full discussion of the law of domicil. But readers will see, in subsequent chapters, that upon this law rests a considerable part of the doctrine relating to the locality in which the divorce suit and the suit for nullity are to be carried on, and the doctrine which controls the decision in questions of conflict between the laws of different countries where the divorce has been had in one country and the validity of it is tried in another. Some views of the law of domicil, therefore, seem indispensable as introductory to the discussion which is to follow.

§ 117. The domicil of a man is the place where he has his home. Various definitions of domicil have been attempted. The leading one which Mr. Robert Phillimore, in his book on the Law of Domicil, has selected from the Roman law, seems to the writer of these volumes to be, on the whole, as judicious as any definition which he has seen. It is in the following words: "In whatsoever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without some special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home; and to which, when he has returned, he is considered to have returned home: in this place, there is no doubt whatever, he has his domicil."¹ Says Story: "By the term

¹ Phillim. Dom. 11.

domicil, in its ordinary acceptation, is meant the place where a person lives or has his home."¹

§ 118. While these definitions seem plain and simple, they are still inadequate to solve many questions which arise in the practical administration of justice. Indeed it is impossible that any definition, in any department of the law, should serve as a complete substitute for the fuller exposition which is embraced in the statement of points in detail. Remembering, however, that a man's domicil is the place where he has his home, let us see, whether, in a single sentence which shall serve as an outline of the law, we cannot set this matter a little more clear before the understanding than it appears in the foregoing definitions. Domicil, then, is the place in which, both in fact and intent, the home of a person is established, without any existing purpose of mind to return to a former home; it is the place where the person lives, in distinction from the place where he transacts his business; the place where he chooses to abide, in distinction from the place in which he may be for a temporary purpose; the place which he has chosen, in distinction from one to which he may be exiled; if he is entitled in law to command where his place of residence shall be, it is the place which he has himself selected, in distinction from any place which another may have selected for him; if the person is an infant or a married woman, it is the place which the husband or father has ordained, in distinction from the place of the person's own choice; it is ordinarily, in the case of the wife, the place where the husband has his domicil; every person has a domicil; no person has but one; it is the place which the fact and the intent, combining with one another and with the law, gravitate to and centre in, as the home.

§ 119. Considering, therefore, the last period to have embraced a general outline of the law of domicil, nothing further will be attempted in this chapter, except to direct the

¹ Story, *Conf. Laws*, § 41.

reader's attention to a few detached points: Mr. Phillimore puts the question, — "Can a man have two domicils?" and adds: "The Roman law has answered in the affirmative, that is, where a man had so set up his household gods in both places as to appear equally established in both; and this answer, properly understood and qualified, is not incorrect, with reference to the international law of the present day."¹ If we were to enter fully into this subject it might be shown, that there is, known to some departments of the law, a sort of *quasi* domicil, which, while it may on the one hand be in a different place from the real domicil, is, on the other hand, taken, for certain purposes, to be the domicil. But the idea, that, in any other sense, a man may have two domicils, — if two, then two hundred as well, — is contrary to modern notions and modern habits and modern civilization. A wandering Arab may perhaps have two domicils; but, where men are attached to localities, each man, though he may be in several localities at different times, and perhaps during different parts of the same day, must be presumed to have chosen one of them as his home, the same as, when he is a married man, and associates with more women than one, he is in law presumed to have selected only one of them as his wife. "Every person," said Shaw, C. J., "must have a domicil somewhere; and a man can have only one domicil, for one purpose, at one and the same time."² And this, it is submitted, is the sounder view.

§ 120. The observations embraced within the last section suggest the answer to the question, whether it may not be that, for one purpose, a man's domicil is in one place; for another purpose, in another place. In a recent English case before the Matrimonial Court, Sir C. Cresswell observed: "On the argument before me . . . it was truly stated, that

¹ Phillim. Dom. 15.

² *Abington v. North Bridgewater*, 23 Pick. 170, 177; s. r. Opinion of the Judges, 5 Met. 587, 589; *Thorndike v. Boston*, 1 Met. 242. And see *Judson v. Lathrop*, 1 La. An. 78; *Burnham v. Rangeley*, 1 Woodb. & M. 7.

the word domicil has many meanings, according as it is used with reference to succession, or for determining rights of belligerents, or ascertaining trading privileges.”¹ And the facts of cases would show, that, as mentioned in our last section, the *quasi* domicil is not unfrequently permitted to stand in the place of the real one; for thus is the strict rule of the law, perhaps not improperly, in some circumstances bent, under the semblance of flexibility in a word, to meet the justice of a case, or to conform to the general principles of jurisprudence applicable in the particular department of the law.

§ 121. There is another matter, like the one mentioned in the last section, worthy of note. When the question is, whether, in fact, a particular person is domiciled in a particular place, if there are reasons apparent in the case why the person should desire the domicil to exist in this place in appearance, rather than in another; and why he should at the same time choose the other domicil in fact, rather than this; why, in short, appearance and fact should be different, — the court, or the jury, as the case may be, will closely scan the appearances to see whether really the fact accords with them; while, on the other hand, if no such discordant matter exists in the case, the conclusion of domicil will be readily reached. According to strict law, if a man has determined to change his domicil, — as, for instance, to remove from one of our States to another, — he acquires all the rights pertaining to the new domicil, except indeed, such as may by special statute be made to depend upon his having maintained the domicil for a given number of days or years, the instant his new residence is established.² But suppose the man immediately applies for a divorce in the new locality, and suppose the cause alleged for the divorce is such as would not entitle him to this remedy in the State whence he came, and suppose he left behind him land and houses and

¹ *Yelverton v. Yelverton*, 1 Swab. & T. 574, 585; s. p. *Phillim. Dom.* 18, 19.

² *Cooper v. Galbraith*, 3 Wash. C. C. 546.

friends and business, while he has none of these things in the State where he makes the application, — Who will believe, in such a case, that there is any change of domicile? Every man would know, though such an applicant should swear to the contrary, that he was an adventurer away from home, endeavoring by a false representation to obtain, from a cheated court, a worthless writing in the form of a decree of divorce, wherewith to deceive some unsuspecting woman into a polygamous marriage with him during the lifetime of his real wife. But there might be cases less clear than the one thus put, in which the question would be attended with great difficulty. In still other circumstances, the change of domicile with the change of the personal presence would be readily inferred, though the cause was one of divorce.¹ The fact that generally in our States a residence during a specified number of years is by statute required, before a party can make application for a divorce, where the cause of the divorce occurred elsewhere, is a great preventive of fraud in those cases, but it is not an absolute estoppel.

§ 122. It is familiar to the reader, that there are some circumstances in which a party to an ordinary civil controversy may desire to establish for himself a residence in a State other than the one in which the other party resides, in order to give to the United States tribunals, in preference to the tribunals of the State, jurisdiction to hear the cause. This matter is one of domicile; for, though the word does not occur in the Constitution, the result is so by construction; the parties are to be *domiciled* in different States.² Here, if a person removes into the State *animo manendi*, such removal gives him the citizenship necessary to maintain his suit. But a mere temporary change of place, without any intention of permanent residence, constitutes no change of

¹ Johnson v. Johnson, 4 Paige, 460. And see Greene v. Greene, 11 Pick. 410; Chase v. Chase, 6 Gray, 157.

² Read v. Bertrand, 4 Wash. C. C. 514.

domicil.¹ In one of these cases, Story, J., observed: "If a person, wishing to commence suits in the courts of the United States, instead of the State Courts, chooses to remove into another State, and executes such intention *bonâ fide*, he may thereby change his citizenship. But his removal must be a real one, *animo manendi*, and not merely ostensible."² And upon this principle there can be no doubt, that, in point of law, if a man chooses to remove from his State into another, being attracted to the latter State by a facility which it affords, and his own does not, for obtaining a divorce, the change of domicil is just as effectual as if the motive were of a different kind. The difficulty is one of fact; the *animus non revertendi* will not be so readily presumed in such circumstances as in some others. Yet there are cases which seem to imply, that this doctrine cannot be applied in divorce law, but that the removal must be without the intention of obtaining a divorce, though probably they do not quite come up to this point.³

§ 123. Should the party, after obtaining his divorce in such a case, return to the State of his former residence,—should the return be speedy, should it not be clearly explained, and especially should there be any circumstances connected with the original removal calculated to awaken vigilance,—the conclusion, as one of fact, would be almost incontestable, that there had really been no change of domicil. At the same time, as matter of law, it was not necessary, when the removal was made, that there should be an absolute, fixed resolution never to come back; if a removal is made in good faith, and there is even a floating and undefined purpose, or vague idea, of a return at some future period, still the domicil is changed.⁴ And there is a Massachusetts case

¹ Case v. Clarke, 5 Mason, 70; Shelton v. Tiffin, 6 How, U. S. 163.

² Case v. Clarke, *supra*; s. p. Cooper v. Galbraith, 3 Wash. C. C. 546.

³ Smith v. Smith, 4 Greene, Iowa, 266; Shannon v. Shannon, 4 Allen, 134.

⁴ The State v. Frest, 4 Harring. Del. 558; The State v. De Casinova, 1 Texas, 401; Ringgold v. Barley, 5 Md. 186; Warren v. Thomaston, 43 Maine, 406;

which carries the doctrine so far as to hold, that, if a citizen of this State removes with his family into another State, retaining in this State no dwelling-place, but retaining here his place of business, and intending to retain his domicile and to return at some future period, he still loses in law his Massachusetts domicile.¹ Yet such a person, should he seek a divorce elsewhere, under such circumstances, for a cause which had already occurred while the parties were living in Massachusetts, but which by Massachusetts law was not sufficient to authorize the divorce, would be a peculiarly fortunate litigant could he bend the court and jury to apply the same rule to the case then; for, if he was not domiciled in Massachusetts, he was domiciled in the place to which he removed, so the courts of the latter State had the jurisdiction; and, if they granted the divorce, it was good.²

Putnam v. Johnson, 10 Mass. 488. And see *Plummer v. Brandon*, 5 Ire. Eq. 190; *Hairston v. Hairston*, 27 Missis. 704; *Jennison v. Hapgood*, 10 Pick. 77.

¹ *Holmes v. Greene*, 7 Gray, 299.

² See *Chase v. Chase*, 6 Gray, 157; *Leith v. Leith*, 39 N. H. 20; *McGiffert v. McGiffert*, 31 Barb. 69; *Smith v. Smith*, 13 Gray, 209; *Shannon v. Shannon*, 4 Allen, 134.

CHAPTER IX.

HOW FAR THE RULE THAT THE WIFE'S DOMICIL FOLLOWS THE HUSBAND'S, IS APPLICABLE IN CAUSES OF DIVORCE AND NULLITY.

§ 124. THE importance of the discussion intended for this chapter appears in the consideration, that, in nearly all of our States, probably in all of them, the party applying for the divorce must have resided in the State during a specified period of time, especially where the offence occurred out of the State, in order to give the court — such are the terms of the statutes — jurisdiction over the cause. But if the wife is to be deemed, under all circumstances, to reside where the husband does, and to be deemed incapable of acquiring a residence separate from his, a result quite different will be wrought out, in regard both to the right of the courts to take jurisdiction, and the effect of their sentences when the jurisdiction is taken, from what would come of the opposite doctrine.

§ 125 [728]. The general rule of law is familiar, that the domicile of the wife follows the husband's.¹ Still it will probably be found, on examination, that the doctrine rests, not merely on the legal identity of husband and wife, but also and more particularly on her duty to dwell with the husband wherever he dwells. If he commits an offence which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial

¹ *Greene v. Greene*, 11 Pick. 410; *Hairston v. Hairston*, 27 Miss. 704. And see *Waterborough v. Newfield*, 8 Greenl. 203; *Brewer v. Linnaeus*, 36 Maine, 428.

determination of the question, from her duty to dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy.¹ In other words, she must establish a domicile of her own, separate from his; though it may be, or not, in the same judicial locality with his. Courts, however, may decline to recognize such separate domicile in a collateral proceeding; that is, a proceeding other than a suit for divorce, or some suit in which the status of the parties in respect to the marriage is to be directly determined. But when the wife is plaintiff in a divorce suit, it is the burden of her allegation, that she is entitled, through the misconduct of her husband, to a separate domicile. If she fails to prove this, she fails in her cause; if she does prove this, she establishes her cause. So when parties are already living under a judicial separation, or divorce from bed and board, the domicile of the wife does not follow the husband's.²

§ 126 [729]. If, on the other hand, the wife commits an offence which entitles the husband to a divorce, and he brings his suit in his own jurisdiction, while she is found in another, it seems clear upon principle, as it appears to be settled by authority, that she cannot set up her own offence in answer to his claim; and, since she is bound to follow him, his domicile must, for the purposes of the litigation, be taken as against her to be hers also. This principle has been carried at least to the extent of avoiding any mere technical objection to the court's taking jurisdiction of the husband's cause, when the wife has been in fact dwelling in another country.³

¹ Ante, § 38-40.

² *Williams v. Dormer*, 16 Jur. 366, 9 Eng. L. & Eq. 598, 2 Robertson, 505; *Barber v. Barber*, 21 How. U. S. 582.

³ *Warrender v. Warrender*, 2 Cl. & F. 488; *Chichester v. Donegal*, 1 Add. Ec. 5, 19; *Tovey v. Lindsay*, 1 Dow, 117, 138, 139; *Whitcomb v. Whitcomb*, 2 Curt. Ec. 351, 7 Eng. Ec. 139. But see *Borden v. Fitch*, 15 Johns. 121; *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 582. And see *Greene v. Greene*, 11 Pick. 410; *Hull v. Hull*, 2 Strob. Eq. 174; *Harrison v. Harrison*, 19 Ala. 499; *Hare v. Hare*, 10 Texas, 355.

§ 127 [729]. Upon the like principle, if the wife is plaintiff, and by the local law it is necessary for plaintiffs in divorce controversies to be domiciled in the country, she may sustain herself on her husband's domicile there, though she is in fact living abroad; and he cannot set up, in answer to this position, his own wrong, on account of which she has lawfully acquired another domicile.¹ This doctrine, however, has been denied by some courts,² and in others it is perhaps not settled.³ In a late New Hampshire case it appeared, that the husband had deserted his wife in Massachusetts, where her residence still remained; that he had then removed, without her, to New Hampshire; and in this condition of things she applied in New Hampshire for her divorce. But she was refused, on the ground of her non-residence. Said Fowler, J.: "It is contended for the libellant, that, if the husband's residence was in Rindge [N. H.], of which there is some evidence, the wife's must constructively and in contemplation of law have been there also. We do not think this position can be maintained. When the husband abandoned his wife, necessity of separate and independent existence gave her a separate residence and domicile; and, when he came into this State, leaving her in Massachusetts, her domicile remained there with her, and there it still continues."⁴

§ 128 [730]. It is not apparent how it can be any more a uniform rule, that the wife's domicile shall follow her husband's, than that she shall not sue her husband. If she has adverse interests, and the law gives her the right to sue, it must give her, by implication, a domicile in which to bring the suit; on the familiar principle, that every right carries with

¹ *Masten v. Masten*, 15 N. H. 159, as to which, however, see the concluding part of this section; *Kashaw v. Kashaw*, 3 Cal. 312; *Harrison v. Harrison*, 20 Ala. 629. See *Thompson v. The State*, 28 Ala. 12, 17; *Hanberry Hanberry*, 29 Ala. 719, 724. And see post, § 209.

² *Schonwald v. Schonwald*, 2 Jones Eq. 367; post, § 159.

³ *Kruse v. Kruse*, 25 Miss. 68; *Ashbaugh v. Ashbaugh*, 17 Ill. 476.

⁴ *Hopkins v. Hopkins*, 35 N. H. 474.

it, by implication, whatever is necessary to make it effectual.¹ Upon this point, Shaw, C. J., has observed: "It is probably a juster view to consider the maxim," that the wife's domicile is the husband's, "to be founded upon the theoretic identity of person and of interest between husband and wife, as established by law; and the presumption, that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen, and secure their interests in this relation, as it ordinarily exists where union and harmony prevail. But the law will recognize a wife as having a separate existence, and separate interests, and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home; bed and board being put, a part for the whole, as expressive of the idea of *home*. Otherwise the parties, in this respect, would stand upon very unequal grounds; it being in the power of the husband to change his domicile at will, but not in that of the wife."² And the doctrine, that, for purposes of divorce, the wife may have a domicile separate from her husband, is well established in the American tribunals; although some of the authorities would seem to take the distinction (it is submitted, without proper foundation), that a wife cannot lose her domicile by the husband's change of residence after the offence is committed, yet cannot, on the other hand, acquire a new one.³ It has indeed been distinctly laid down, that the wife cannot,

¹ *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 582; *Stevens v. Stevens*, 1 Met. 279; 1 Bishop Crim. Law, § 83.

² *Harteau v. Harteau*, 14 Pick. 181, 185. And see also *The Republic v. Skidmore*, 2 Texas, 261.

³ *Frary v. Frary*, 10 N. H. 61; *Harding v. Alden*, 9 Greenl. 140; *Sawtell v. Sawtell*, 17 Conn. 284; *Fickle v. Fickle*, 5 Yerg. 203; *Richardson v. Richardson*, 2 Mass. 153; *Brett v. Brett*, 5 Met. 233; *Fishli v. Fishli*, 2 Litt. 337; *Tolen v. Tolen*, 2 Blackf. 407; *Hare v. Hare*, 10 Texas, 355; *Hinds v. Hinds*, 1 Iowa, 36, 50; *Hanberry v. Hanberry*, 29 Ala. 719, 724; *Moffatt v. Moffatt*, 5 Cal. 280; *Yates v. Yates*, 2 Beasley, 280; and the other authorities cited to this section. See also *Dasent v. Dasent*, 1 Robertson, 800; *Wharton v. Mair*, Ferg. 250, 3 Eng. Ec. 414; *Harrison v. Harrison*, 19 Ala. 499; *Vischer v. Vischer*, 12 Barb. 640; *Shanks v. Dupont*, 3 Pet. 242; *Chase v. Chase*, 6 Gray, 157.

by a removal of her habitation after the commission of the offence, acquire a new jurisdiction in which to prosecute her claim for divorce;¹ though it is believed the preponderance of American authority, as well as weight of argument, is greatly the other way.

§ 129. On this subject of the capacity of the wife to have a domicile separate from her husband's, the following further suggestion may be useful. When the parties are living apart, under articles of separation, the wife's domicile must necessarily be, in law, the same with her husband's, else the effect of such articles would be to make the separation legal, — they would amount to a *quasi* divorce, — contrary to what we have seen to be the established doctrine.² Therefore when a separation of this nature exists, or any ordinary separation by mutual consent, the domicile of the wife is the same with that of the husband, precisely as if the parties were on terms of cohabitation, and one were temporarily absent from the other.³ And if the question should come up collaterally, where, in fact, the ill conduct of the husband had justified the wife in separating from him; as, for example, if the domicile of the wife in the case of a will made by her should be important, it certainly seems to the writer of these volumes, though he is not able to refer to a decision in point,

¹ *Dorsey v. Dorsey*, 7 Watts, 349; *Neal v. Her Husband*, 1 La. An. 315; *Jackson v. Jackson*, 1 Johns. 424; *Maguire v. Maguire*, 7 Dana, 181, 186; but, in the last two cases certainly, the wife had not become a permanent resident of the State where she brought her suit, and for that reason could have no domicile there. And see *Cooper v. Cooper*, Milward, 373; *Pawling v. Bird*, 13 Johns. 192, 208; *Tenducci's case*, cited 3 Phillim. 595; *Collett v. Collett*, 3 Curt. Ec. 726, 7 Eng. Ec. 563; *Dasent v. Dasent*, 1 Robertson, 800; *Glover v. Glover*, 16 Ala. 440. In Pennsylvania it was enacted, Stat. April 13, 1815, § 15, that "no person shall be entitled to a divorce from the bond of matrimony, &c., who is not a citizen of this State, and who shall not have resided therein at least one whole year previous to the filing his or her libel or petition." It was afterward deemed necessary to provide, by act of April 18, 1843, that the word "citizen," used in the above section, "shall not be construed to apply to any woman who shall have had a *bona fide* residence in this State, at least one whole year, previous to her filing her petition or libel." *Hollister v. Hollister*, 6 Barr. 449, 452.

² Vol. I. § 634 et seq.

³ *Warrender v. Warrender*, 2 Cl. & F. 488.

that the wife's domicile must be taken to be the same with the husband's; because, in such collateral proceeding, the question whether the husband had been guilty of adultery, or of cruelty, or of any other offence having the same legal effect, could not be inquired into.

§ 130. Likewise where the suit between the parties is for the restitution of conjugal rights, neither party should be permitted to allege the separation as ground on which to give the wife a domicile separate from the husband. This exact point recently arose in England, and the learned Judge Ordinary, Sir C. Cresswell, refusing to allow to the wife a separate domicile, and referring to the American law, and to the expositions of it contained in the earlier editions of this work, said: "The privilege there [in the United States] allowed the wife appears to have been founded on principles quite inapplicable to this case, namely, that the party suing (whether husband or wife) must, before suit, reside for a certain time in the State where it is instituted; and therefore, if a wife were bound to follow her husband to sue him where he resides, he could always defeat her suit by changing his residence before she could commence it. Another ground was, that the wife then contended, that by her husband's delinquency she had a right to be released from the marriage tie; whereas here she is seeking to enforce it."¹ If in our States, it is submitted, the rule referred to by this learned person, whereby the suit can ordinarily be brought only in the State in which the complaining party resides, were not established by statutes, the same result as to the wife's power to have a separate domicile would still follow from the other principle mentioned in the foregoing extract. In this view, the distinction seems both plain and just. If a husband deserts his wife and establishes thereupon a new domicile, while the wife remains behind, — then, if she sues for a divorce by reason of the desertion, — the burden of her complaint is, that he refused, alike in the domicile in which

¹ *Yelverton v. Yelverton*, 1 Swab. & T. 574, 591.

the suit is brought, and in the domicile to which he removed, to extend to her the matrimonial *consortium*; wherefore she was justified in remaining where she was, or in seeking a new domicile, at her election. If she establishes the allegation, she succeeds in her case; if she does not, she fails. But in the suit for the restitution of conjugal rights, no such issue is presented. There appears merely the fact of the parties' not living together, coupled with a prayer for cohabitation. For example, there may have been a separation under articles, — a case in which, as we have seen,¹ there is no separate domicile acquired; yet the articles are no bar to this suit,² while they would be a bar to the divorce suit for desertion.³

§ 131. Whether the English tribunal in which the distinction mentioned in the last section was drawn, will follow the American rule in cases in which it is applicable, is matter upon which the writer is not able to speak with certainty. In the very case under consideration the judge observed: "I have already stated, that, in my opinion, she [the wife] could not, as a married woman, acquire a domicile recognized by the law other than that of her husband,"⁴ — words, however, which do not necessarily conclude the point.⁵ In a later case it appeared, that, after a separation under articles in England, the husband removed to the United States, where he became domiciled, and, in the place of this his new domicile, committed adultery and bigamy. The wife, remaining in England, sued him there for a divorce *a vinculo*, and had her prayer allowed. It was a case heard before the full court; and here, upon the facts as thus stated, we seem to have the American doctrine fully recognized; for surely, an American lawyer would say, an English tribunal would not take jurisdiction of a divorce cause where neither of the parties was domiciled in England. But when we look into

¹ Ante, § 129.

² Vol. I. § 634, 786, 806.

³ Vol. I. § 783.

⁴ *Yelverton v. Yelverton*, 1 Swab. & T. 574, 591.

⁵ Vol. I. § 63.

the case we find the following language held by the Judge Ordinary, speaking for himself and the rest: "Both parties were natural-born English subjects; both, therefore, owed allegiance to the crown of England, and obedience to the laws of England; that allegiance cannot be shaken off by a change of domicile; the husband, therefore, although he became domiciled in America, continued liable to be affected by the laws of his native country." And upon this ground, without any allusion to the other, the case went to judgment.¹ Who shall say, that the doctrine of perpetual allegiance is ever to die in England, while the soil remains?

¹ *Deck v. Deck*, 2 Swab. & T. 90, 92. And see *Bond v. Bond*, 2 Swab. & T. 93; *Zycklinski v. Zycklinski*, 2 Swab. & T. 420; *Palmer v. Palmer*, 1 Swab. & T. 551; *Simonin v. Mallac*, 2 Swab. & T. 67.

CHAPTER X.

THE GENERAL DOCTRINE AS TO THE LOCALITY IN WHICH THE SUIT TO DISSOLVE THE MARRIAGE IS MAINTAINABLE.

§ 132. It is not proposed to discuss, in this chapter, the question under what circumstances courts, by direction of particular statutes, will take jurisdiction to grant divorces in our several States. This matter will be examined in brief in a subsequent chapter. What is here to be considered is, under what circumstances do the principles of our inter-State law, and of private international law generally, require the jurisdiction to be assumed or declined, when the divorce sought for is from the bond of matrimony. And it is to be observed, that, in cases in which the jurisdiction is improperly taken, the divorce, when decreed, will be deemed a nullity in other States and countries; because, according to a well-known principle pervading our international and inter-State jurisprudence, when a jurisdiction is assumed which, according to just international and inter-State doctrine, does not belong to the tribunal assuming it, even though the tribunal does act under the express direction of a statute, its judgment is everywhere else to be held as null. The late Chief Justice Marshall, speaking for the United States Supreme Court, expressed, in one case, the doctrine in the following terms: "Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominion of the prince from whom the authority is derived, they are not regarded by foreign courts. This

distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.”¹

§ 133. The distinctions upon this subject may be otherwise expressed thus: If the tribunal assuming a jurisdiction had no authority to act in the premises according to the law of the country in which the tribunal sits, its judgment will be a nullity equally at home and abroad, even though there should be no objection to its jurisdiction on principles of international law. On the other hand, if the tribunal had, by the law of the country in which it sits, a jurisdiction to act in the premises, its judgment until reversed will be binding at home, whether it is binding abroad or not. It will be binding or not binding abroad,—that is, if binding, it will be so to the extent to which the courts abroad give validity to the class of foreign judgments to which it belongs, be this extent greater or less,—according as the jurisdiction was competent to the court or not, on principles of international law.²

§ 134 [714]. We shall have occasion, in a chapter further on in this volume, to consider the effect, at home and abroad, of sentences of divorce and the like, rendered in cases wherein the jurisdiction of the tribunal rendering them is conceded. According to the doctrine there to be laid down, a sentence of divorce or of nullity, pronounced by a competent court, having jurisdiction of the subject-matter, in one country, is binding upon the courts of every other country. The quali-

¹ *Rose v. Himely*, 4 Cranch, 241, 276, 277.

² I have not attempted to state the matter in the text in the language of any of the cases, but the following, among others, may be consulted: *Davis v. Smith*, 5 Ga. 274; *Pearson v. Darrington*, 32 Ala. 227; *Hickey v. Stewart*, 3 How. U. S. 750; *Stoughton v. Mott*, 13 Vt. 175; *Cheriot v. Fousseat*, 3 Binn. 220; *Wyman v. Campbell*, 6 Port. 219; *Georgia Railroad & Banking Co. v. Harris*, 5 Ga. 527; *Camden v. Mulford*, 2 Dutcher, 49; *Martin v. Carron*, 2 Dutcher, 228; *Carron v. Martin*, 2 Dutcher, 594; *United States v. Yates*, 6 How. U. S. 605; *Flowers v. Foreman*, 23 How. U. S. 132; *Wyatt v. Judge*, 7 Port. 37; *Stamps v. Newton*, 3 How. Missis. 34; *Bostwick v. Perkins*, 4 Ga. 47.

fication to be introduced to the general proposition is, as thus intimated, that, for the judgment to have any efficacy abroad, the tribunal rendering it must have authority over the question as it relates to the particular parties. And the authority must not only have been given by the law of the particular country in which the court sits, but it must also be an authority harmonious with the doctrines of international jurisprudence. The cases in which this matter has principally arisen are, where sentence has been pronounced dissolving a marriage for an offence committed subsequently to its celebration. Ordinarily a judicial tribunal will give effect to a foreign matrimonial judgment, rendered under circumstances in which it would itself interfere in behalf of parties similarly situated.¹ Yet if the courts of a foreign State, under command of a statute, take jurisdiction to dissolve a marriage where they have no rightful authority over the cause, their judgment will be disregarded by the domestic tribunals, notwithstanding a similar statute at home would have compelled the latter to proceed in the same manner, under like circumstances.² Obviously, however, so illiberal a doctrine should be acted upon only in extreme cases.

§ 135 [715]. Let it, on the other hand, be borne in mind, that, to determine whether a foreign tribunal rightfully took jurisdiction over a cause of divorce, the method is not to inquire, whether the local jurisprudence of our own country gives the same jurisdiction; because numberless technical obstacles there are, in particular States and countries, of which the international law takes no cognizance. For example, if the constitution of the English ecclesiastical tribunals, wherein all divorce causes were heard anterior to the year 1858, and the statutes of England governing the Ecclesiastical Courts, forbid the citation of any defendant out of his diocese; while a particular defendant, domiciled abroad,

¹ *Harding v. Alden*, 9 Greenl. 140, 147; *Cooper v. Cooper*, 7 Ohio, 238.

² *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 581.

belongs to no diocese within the kingdom; this might perhaps have been an insuperable obstacle to those tribunals practically exercising the jurisdiction,¹—a matter, however, which does not apply to the present divorce court under the statutes now existing;—but the consequence by no means follows, that the jurisdiction was not properly in those courts, and that, if the technical difficulty were removed, their judgment in such a case would not be entitled to credit in other countries. So in most of the American States, it is necessary under statutes for the plaintiff to have resided in the State a specified number of years, before bringing his suit for divorce; but it does not follow, that a decree pronounced abroad where such previous residence is not required, would not receive full faith and credit in those States where it is. These statutory provisions need not here be discussed; our object being to determine, when there is a proper jurisdiction without reference to statutes.

§ 136 [716]. Still the foregoing views only lead us again to the proposition, that, whenever a tribunal is unincumbered by specific statutory direction, it should take or decline the jurisdiction over a matrimonial offence, made by the law of the State ground of divorce, according as the circumstances are such as to render the judgment it may pronounce dissolving the marriage good in other countries, or not good in them, under a true construction of the international law on this subject.² Therefore in the following sections we shall treat of these two branches of the doctrine as one; bearing in mind, that we are not considering technical difficulties, under particular local statutes, so much as considering the general and international law on the subject.

§ 137 [717]. With these preliminary observations, we come to the subject of our inquiries; namely,—What are the circumstances which give a court rightful jurisdiction

¹ See post, § 158 and note.

² See, for a discussion of the principle here involved, Vol. I. § 348 et seq. through a considerable part of the chapter.

over a cause of divorce? This is a question, in some of its branches, of considerable obscurity and conflict in the authorities; but, as we approach it, we are furnished with a key which we shall find, as we proceed, will unlock most of its difficulties, and enable us to pass freely through its intricacies and partially illumined ways. It is, to use the language of Taney, C. J., of the Supreme Court of the United States, that, "*every State has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory.*"¹ The proposition indeed, as laid down by the learned judge, was applied, as the facts of the case show, only to our inter-State, and State-and-national, jurisprudence, and to the single status of slavery; but it admits equally of the broader application given to it in these pages. Mr. Burge has expressed the same thing in similar language. He says, the status of persons is "conferred by the laws of the domicile;" and, within this principle, he in terms includes marriage, in respect both to its institution and dissolution;² though we have seen,³ that to its institution there are qualifications applicable which do not apply to its dissolution. "Each State," he says in another place, "possesses the power of regulating the enjoyment and transfer of property situated in its territory; and of *defining the civil rights and capacities* of those who may become its subjects by birth, by acquired domicile, or even by temporary residence."⁴ This doctrine results necessarily from the familiar and well-settled principle of international law, that each nation has an exclusive sovereignty within its own territory;⁵ which

¹ *Strader v. Graham*, 10 How. U. S. 82.

² *Burge Col. & For. Laws*, 57, 58.

³ Vol. 1. § 351-353.

⁴ 1 *Ib.* 2. "In the opinion of the greater number of jurists, the law of the actual domicile, and not that of the domicile of origin, determines the status or capacity, in every case except in that of legitimacy or illegitimacy, and the capacity to become legitimated by the subsequent marriage of the parents, and of freedom or slavery. This opinion is supported by the preponderance of authority, and is most consistent with the principles on which the recognition of a foreign law is founded." 1 *Ib.* 13, 14. See also *Story Conf. Laws*, § 51; post, § 144-146.

⁵ *Story Conf. Laws*, § 18.

sovereignty also, existing in like manner in every other nation, precludes the former from exercising a direct authority beyond the limits of its own dominions.¹ We have seen,² that marriage is a status; so the question of divorce is one of status.

§ 138 [717 a]. In a previous chapter³ we had occasion to see, that, according to the better doctrine, the international law of marriage enables persons to enter into this relationship, whenever they choose, by conforming to the law of the place where they are for the moment, though this law should be more open to them than the law of their domicil. But for reasons mentioned in the same chapter,⁴ the same rule does not apply to divorce. And the necessity and natural right which established the rule mentioned, as applicable to marriage, establishes the other rule mentioned, as applicable to divorce. The interest and policy of every nation being to favor marriage, no harm can come from permitting persons to marry wherever they may be, in any part of the world, by simply conforming to the law of the place; yet just as strongly as this consideration presses in favor of the rule drawn from it, just so strongly it presses against any such rule as applied to divorce; because divorce is the opposite of marriage, is the undoing of what policy demands should be done. And though the laws of every country ought to allow divorce under some circumstances, yet the domestic law should not, in this regard, be overridden by the foreign. If it were, then parties might be divorced when they pleased, by going to some country where the divorce was permissible, in utter disregard of the law of their domicil.

§ 139 [718]. A distinction illustrative of this subject is the following: While every State determines the status of per-

¹ *Ib.* § 20.

² Vol. I. § 348, et seq.

³ Vol. I. § 351-353 and elsewhere.

⁴ Vol. I. § 1 et seq.

sons domiciled within it,¹ and usually gives to those who come from abroad the status they bore abroad, still no State uniformly accepts of every status which any person coming into its dominions may have sustained elsewhere. Generally indeed, when one comes, even temporarily,² from a foreign State or country to our own, we permit such person to have while with us his former status; but this depends upon the nature of the status in question. If it is a status not recognized by our domestic law, we refuse to receive it; but ordinarily we do receive it, when our law acknowledges the like status. Still in the latter case, the status stands upon our own law, not upon the foreign.³ For example,—if two persons in South Carolina sustain the mutual status of master and slave, the tribunals of Massachusetts will take cognizance of it, like any other matter of foreign law, while they remain there; but, if they remove to Massachusetts, the relation will not be recognized in the latter State, slavery being against the policy of its laws, which know, indeed, of no such condition existing within its borders. If, however, these persons remove to Virginia instead of Massachusetts, they will sustain there the former status, because it is both known to the laws of Virginia, and is harmonious with their policy.⁴ Yet as the laws of slavery in the several slave States vary, the slave who is removed from South Carolina into Virginia sustains a slightly different status in the latter State from what he did in the former; his condition in society, after the removal, being determined by the laws of the State to which the removal was made.

§ 140 [719]. Marriage, as said many times in these volumes, accords with the policy of every Christian and civilized country; being moreover an institution, not only of municipal, but of natural and of international law. It everywhere

¹ See Story Confli. Laws, § 51, 65–68, 71, 101; 1 Burge Col. & For. Laws, 258.

² Story Confli. Laws, § 102.

³ See Story Confli. Laws, § 23, 69; Vol. I. § 367.

⁴ See *Ib.* § 32, 96, 96 a, 98.

originates in the consent of the parties, while dissoluble only at the sovereign pleasure. From these and the foregoing propositions therefore it follows:— first, that the laws of every State must determine the matrimonial, as every other, status of its domiciled subjects; secondly, that the tribunals of every other country must ordinarily look to the laws of the domicile in respect to the same question; thirdly, that, when persons remove from one State or country to another, they will immediately assume in the latter the same status, whether as married or single, which they sustained in the place of their last preceding domicile; fourthly, that they so assume it by virtue of the law of their new domicile, not of the old, to which old law they are no longer subject, and the status in the new locality assumes the character and incidents given it by the new law, not the old. Marriage could not indeed be a thing either of international law, or of universal private right and obligation, and be governed by any other principles. It could not be international, unless there was a uniform rule among all nations whereby to determine whether or not it exists; it could not be treated as resting in private or natural right, unless the relation lawfully established was respected everywhere; and, since there must be a uniform rule, such rule can refer the question to no other law than that of the domicile of the parties, without overturning the authority of governments over their own subjects. How far these propositions conflict with what was said relating to marriage, as distinguished from divorce, has been considered elsewhere.

§ 141 [720]. The exclusive right, therefore, of each State to determine the matrimonial status of persons domiciled within it, gives its tribunals exclusive jurisdiction over divorce causes between them. In the language of Judge Story: “The doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bonâ fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law; without any reference to the law of

the place of the original marriage, or to the place where the offence for which the divorce is allowed was committed.”¹ This doctrine has forced its way through many a field of conflict; and, though its authority is fully acknowledged in the United States, it is hardly so either in England or Scotland. There is hope, that, triumphing everywhere, it may yet bring into concord in this matter the tribunals of the two countries last mentioned.²

¹ Story Conf. Laws, § 230 *a*; *Harding v. Alden*, 9 Greenl. 140; *Tolen v. Tolen*, 2 Blackf. 407; *Wall v. Williamson*, 8 Ala. 45; *Wall v. Williams*, 11 Ala. 826; *Hanover v. Turner*, 14 Mass. 227; *Fellows v. Fellows*, 8 N. H. 160; *Barber v. Root*, 10 Mass. 260; *Pawling v. Bird*, 13 Johns. 192; *Jackson v. Jackson*, 1 Johns. 424; *Pomeroy v. Wells*, 8 Paige, 406; *Freeman v. Freeman*, 3 West. Law Jour. 475; *Maguire v. Maguire*, 7 Dana, 181; *Harrison v. Harrison*, 19 Ala. 499. Hosack says, this rule “seems to be at once the most equitable in itself, and to afford the best guaranty for the *bonâ fides* of the parties in seeking a judicial dissolution of the marriage.” Hosack Conf. Laws, 286.

² This subject has been considerably discussed by Mr. Burge, in his *Commentaries on Colonial and Foreign Laws*; and, as his work is not in the hands of the American profession generally, I need make no apology for introducing here the following extract; in which the doctrines of the text, substantially, are ably enforced by the learned author. He says: “The following are the considerations on which it is submitted, that neither the *lex loci contractus*, nor the law of the country in which there has been only such a temporary residence as enables a party to sustain a suit, ought to be adopted, but that the appropriate law by which the dissolubility of the marriage is to be determined, is that of the actual domicile.

“The *lex loci contractus* is, and ought to be, invoked only for the purpose of ascertaining, whether that which is represented to be a marriage is so in law; or, in other words, whether the relation or status of husband and wife has been legally constituted. When that purpose is answered, and it has been ascertained, that, according to that law, a valid marriage has been contracted; as the connection of the parties with the country in which that law exists, and consequently their subjection to that law, cease, so the law itself ceases to be the rule or authority which governs their conduct, or regulates their rights and obligations.

“The contract or consent on which the status of husband and wife is founded, should be considered as perfectly distinct from the status itself. The latter is *juris gentium*, and its relations extend so far beyond the parties themselves, that, unlike a contract, it is not in their power to prescribe for themselves the rights which it shall confer, or the obligations which it shall impose on them. . . .

“The municipal law of every country takes upon itself to define and declare the rights, duties, and obligations, which shall be incident to the status of marriage, whether that status has been originally constituted under its own law, or under that of any other country.

“It would be deprived of its legitimate power, if persons, by importing the regu-

§ 142. In the discussion of particular propositions to be conducted in the next chapter, we shall have occasion to

lations prescribed by the law of some other country for their exclusive government, could withdraw themselves from those which the municipal law of the country in which they reside had prescribed for all its inhabitants.

"It is not therefore to the law by which the status is originally constituted, but to the law which, after it has been constituted, defines its rights, conditions, duties, and obligations, that resort must be had, in ascertaining what those conditions, rights, duties, and obligations are. These are questions, not of contract, but of status; and they ought to be determined by that law which would be applied to the decision of other questions of status.

"The decisions in the negro *Sommersett's case*, 20 Howell St. Tr. 1; and *Knight v. Wedderburn*, 15th Jan. 1778, Morr. Dict. Decis. 14545, that a slave of the British Colonies, on his arrival in any part of the United Kingdom, became immediately free, proceeded on the principle, that the status became no longer subject to the law of the country in which it was constituted, when the party ceased to be domiciled in that country, but subject to the law of the country in which he had arrived. They were not, and could not be, founded on the abstract principle that slavery was universally illegal, and therefore, that no law under which it existed could be recognized in an English court; because the same law which said that slavery was unlawful, and *could not exist in England*, 'that its air was too pure for slavery to breathe in,' that 'the moment the slave put his foot on the shores of England he became free,' also said, 'that slavery did and *could exist in her colonies*;' and the daily decisions of her courts recognized it as a subject of property. In the conflict between the law of England and that of her colonies, the jurisprudence of England and Scotland, whilst it recognized the colonial law on questions of contract and property, rejected it in the question of status, and adopted the law of England, because it had become the slave's domicile. Upon this principle, also, the status of slavery, which had ceased whilst the person remained in England, was held to revive when he returned to the colony. *The Slave Grace*, 2 Hag. Adm. 94; *Williams v. Brown*, 3 B. & P. 69. See the argument of Mr. Hargave, in the negro *Sommersett's case*, 20 Howell's State Trials.

"The selection of the law, by which not only the rights of property, but the personal capacities and powers of the husband and wife, are decided, is made on principles which are equally applicable to, and ought to determine, the selection of the law by which the dissolubility or indissolubility of the marriage is decided. Those capacities and powers are decided, not by the *lex loci contractus*, but by the law of the country in which the husband is actually, or in which he intends to be domiciled. . . .

"It has been assumed, that the dissolubility or indissolubility of the marriage is an essential part of the contract itself. There seems to be a striking fallacy in this assumption. It confounds the municipal regulations which prescribe the form in which the marriage is contracted, and authorize or disallow its dissolution, and which are limited in their operation to the country in which they are established, with those qualities which are paramount to all municipal law, and are of universal obligation. The only qualities which can be called essential, because they are

consider, to some extent, what are the doctrines upon this subject maintained in Scotland and in England. But that

required as indispensable in the constitution of the conjugal relation in every country where Christianity and the law of nations are recognized, are the consent and capacity of the parties, and no such propinquity between them as is within the prohibited degrees.

"The diversity in the laws of different countries, and at different periods in the same country, as to the manner of contracting marriage, abundantly establishes the distinction as it regards the constitution of the status. It also establishes, that its dissolubility or indissolubility is not an essential quality of the marriage. It has been forcibly observed, that the qualities of marriages celebrated before Foljamb's case, when the law of England admitted their dissolubility, cannot be distinguished from those which belong to marriages celebrated since that period, when their dissolubility was denied.

"The assumption, that the indissolubility is an essential quality of a marriage contracted in England, is also inconsistent with the fact, that it may be and is dissolved by an act of parliament. There is an incorrectness in the expression, that an English marriage is indissoluble. It is indissoluble only *sub modo*. It is dissoluble, if the party seeks its dissolution by an act of parliament, instead of instituting a suit before a judicial tribunal. In truth, by the law of England, a divorce *à vinculo* can only be obtained by a particular proceeding. The necessity of resorting to that proceeding is the local municipal regulation to which the law of England subjects the status of marriage.

"Merlin considers the effect which the law of France of 1792, granting divorces, and that of 1816, abolishing divorces *à vinculo*, would have on marriages contracted before the promulgation of those laws. If the dissolubility or indissolubility of the marriage was an essential quality, or, in his language, if it were *comme l'état époux l'effet immédiat et la simple conséquence* of the marriage, there could be no doubt, that, as the status was constituted by the law as it existed at the time of the marriage, the parties would be justified, in the one case, in insisting that their contract was, that their union should be indissoluble, and in the other, that it should be dissoluble in certain cases: 'et que, dans l'un comme dans l'autre, ce serait à la loi du temps du contrat qu'il faudrait s'en rapporter sur la force du lien que les parties contractantes auraient formé.' But he denies that it is. . . .

"It has never been insisted, that the *lex loci contractus* ought to be applied in determining for what causes, and under what circumstances, it was competent to grant divorces *a mensâ et thoro*. Neither has it been assumed, that the cause for which the temporary separation of the parties might take place was an essential quality of the marriage contract. If there were any foundation for such an assumption, in respect of a permanent separation dissolving the marriage, it would equally exist in respect of the temporary separation of the parties.

"The means by which the discharge of the duties and obligations of the status may be most effectually secured, the redress which ought to be afforded to either party when they have been violated, the manner in which the public morals and good order of society may be best promoted, are the objects of every State in the municipal regulations by which it authorizes the temporary separation of the par-

there is a tendency in the latter country, at least, toward the American rule of the domicile, may be perceived, among other

ties, and suspends the obligations of the status. Each State is the best and only judge of the means by which these objects may be most effectually attained; and, as it is only bound, so it only professes, to consult the interests of its own subjects. It therefore applies its own law to those who are its subjects, and for whom, therefore, that law was established.

"The exclusion of the *lex loci contractus*, and the adoption of that of the domicile in questions of divorce *a mensâ et thoro*, afford a strong argument for the exclusion of the former, and the adoption of the latter, in questions of divorce *à vinculo*. The latter, no less than the former, species of divorce, is a municipal regulation, and both originate in the same considerations, and are directed to the same objects.

"The adoption of the *lex loci contractus*, when it does not allow the dissolution of a marriage, would require, that it should be adopted when it does allow the dissolution. Hence, a marriage contracted in Scotland, Prussia, or any other State, ought to be deemed dissoluble in England. But as no judicial tribunal is established in England possessing jurisdiction to dissolve it, the law cannot enforce its own principle. Such a defect of jurisdiction affords an additional ground for doubting the correctness of that principle. The soundness of any principle of international jurisprudence may be reasonably doubted, when the country which adopts it does not afford the judicial means of giving it effect.

"But the adoption of the law of the domicile does not involve any such inconsistency. A person who had contracted a marriage in Scotland, and applied to a judicial tribunal in England for a divorce *à vinculo*, would fail in his application, because the law to which he had subjected himself, either by resorting to it, or by his actual domicile, did not authorize such a divorce. The rejection would be warranted by the *lex loci domicilii*.

"Upon these grounds it is submitted, that the adoption of the *lex loci contractus* in questions of divorce is not warranted, either by the purpose for which this rule has been established, or to which it has been accustomed to be applied, but that it is at variance with those principles of international jurisprudence which have obtained the general concurrence of jurists, and are best calculated to maintain the legitimate authority of the laws, as well as to promote the common interests of all States.

"As its dissolubility or indissolubility is no part, express or implied, of the contract of marriage, but is an incident to the *status* of husband and wife after it has been constituted by such contract, it must be determined by the law to which the *status* is subject. In a preceding part of this work [vol. i. p. 102; 244, Burge Col. & For. Laws], it has been shown on the authority of jurists, and, it is conceived, on grounds of public policy, that the law to which it is subject is that of the actual domicile.

"The same considerations which exclude the *lex loci contractus* from the decision of the question of dissolubility, recommend the adoption of the law of the actual domicile, rather than that of the country in which the residence of the party has been taken up for no other purpose but that of instituting a suit. . . .

things, in a protest which the House of Lords sent, in 1860, to the House of Commons, against a proposed amendment

"The incidents and qualities of the *status* are conferred by the law of the country in which the person acquires a residence *animo remanendi*. A State has no interest in, nor does it profess to regulate, the condition of those who are to all intents and purposes foreigners; except so far as by their acts or conduct, or in respect of their property, they become the objects of her laws. Thus, when it is said by Burgundus, Lauterback, Hertius, and other jurists, '*tota personæ conditio et status regitur à legibus loci cui ipsa sese per domicilium subiecit*,' they contemplate, not the place of a temporary residence, to which the person has paid a transient visit, but '*illud domicilium ubi quis frequentius ac diutius commorari solet rerumque ac fortunarum suarum maiorem partem constituit*.' Hertius, De Coll. vol. i. § 5; Ib. § 8, pp. 124, 125.

"Hertius has pointedly contrasted the limited and qualified effect of the law of a place of mere temporary residence, with that of the law of the real domicil: '*Leges, quæ personæ qualitatem sive characterem imprimunt, comitari personam soleant, ubicumque etiam locorum versetur, tametsi in aliam civitatem migraverit. . . . Quandoquidem externa illa civitas in advenam non habet potestatem, nisi ratione actuum, vel bonorum immobilium; in reliquis iste patrici suæ manet subjectus*.' Ib. p. 123. In a preceding passage he has explained in what respect, and by what means, this partial and limited subjection takes place: '*Ratione actuum subjiuntur cujusque generis personæ, etiam advenæ sive exteri, vel transeuntes vel negotiorum suorum causâ ad tempus in civitate commorantes, quatenus nimirum ibi agunt, v. g. contrahunt vel delinquant*.' Hertius, vol. i. § 4, p. 121.

"It is perfectly reasonable, and the interests of the civilized world require, that the tribunals of every country should entertain questions of contract between persons who are only its transient visitors; but there is no reason for applying, to the determination of the incidents and qualities of their *status*, a law which never professed to regulate it, which they never contemplated, and to which they have no intention by any future residence of conforming.

"The law by which the succession to movable property is governed, perhaps affords, in the origin and principle of this rule, another reason for adopting the law of the real domicil. The law of this domicil is applied from the presumption, that the owner of this species of property wishes its distribution to be made according to that law to which he had by his domicil subjected himself. But his mere casual or transient residence does not afford this presumption; and therefore the law of the country in which he died is not applied, if it be not also that of his real domicil.

"The competence of the tribunals of one country to dissolve a marriage, in case it has been contracted, or the parties have their real domicil, in another country, becomes a question in consequence of its not being dissoluble either by the *lex loci contractus*, or by the law of the real domicil. Hence the party resorts to the tribunal of the foreign country for the purpose of avoiding the disability, or contravening the prohibition, imposed by the law of his own country. It seems scarcely compatible with the respect which States owe and render to the laws of each other, that the tribunals of one should afford assistance to the subject of

to a pending bill for removing the conflicts which had theretofore existed, and probably exist still, in the laws of the two countries on this subject. "A suit," said the Lords, "to dissolve the tie of marriage ought to be entertained only by the courts of the country in which the parties whose marriage is to be dissolved are *bonâ fide* domiciled, according to the well-known law by which the succession to movable estate is regulated in case of intestacy."¹ The Faculty of Advocates of Scotland, however, had expressed an opinion opposed to this view; so, as the Lords would not agree to what the Scotch lawyers deemed to be just in jurisprudence, the bill failed to become a law. At the next session of parliament, Stat. 24 and 25, Vict. c. 86, entitled "An Act to amend the Law relating to Conjugal Rights in Scotland," was passed; but it omitted any provision upon the point now under consideration.²

another State, in withdrawing himself from the operation of a law which is obligatory on him. Nor is it required by any considerations for the supremacy of its own laws, that such assistance should be afforded.

"Jurists generally concur in considering, that a person by his removal from another country, for no other purpose than that of doing an act which the law of his own domicile prohibited, cannot give to such act the validity or legality which the law would have conferred on it, if it had been done by one who had become *bonâ fide* domiciled. [The subject is considered, 1 Burge Col. & For. Laws, 190.] It affords a further ground for not applying the law of divorce in such a case. It has been justly observed, that Lolley's case might have been decided on its own peculiar circumstances. He was making an engine of the law of Scotland to defeat the law to which he was properly amenable. Fergusson App. p. 403. The same observation may be made on the case of Conway v. Beasley." 1 Burge Col. & For. Laws, 680-691.

¹ Fraser on the Conflict of Laws in Cases of Divorce, 10.

² 1. I have before me a tract of 79 pages, written by Mr. Fraser, whose work on the Scotch Law of the Domestic Relations has been so often referred to in these volumes; wherein, in 1860, he attempted, among other things, to show, that the rule of the domicile is not the true rule; and that, while it had theretofore not been followed in Scotland, neither had it been uniformly followed in the English tribunals. As to these two latter points, the practice of the two countries had undoubtedly been precisely as he stated it. As to the former point, he said: "When English lawyers insist upon domicile as the sole basis of jurisdiction in cases of divorce, and assume the responsibility of setting aside the decrees of foreign tribunals, they are bound to give the world reasons for their conduct. The *ipse dixit* of an English judge is not sufficient in the great republic of jurists; and yet

one searches in vain through the roll of cases from *Conway v. Beazley* to that of *Tellemache*, for any reason, except the *sic volo sic jubeo* of the court. It has never been explained why the law of domicile should prevail before every other, when others have the sanction of expediency [have they?] — the interests of humanity and justice [has anybody ever explained that they have?] — and the recommendation of a long antiquity in their favor." *Fras. Confl. Laws of Div.* 45.

2. It is not my purpose to consider, whether the English judges have done their duty in the way of giving reasons or not; but, if what Mr. Fraser calls "the great republic of jurists" shall at any time honor me with looking into my book, I trust he will not tell them, that I have given no reasons; though he may think himself quite justified in saying my reasons are not good ones.

3. Various reasons, such as they are, — some of them being my own, and others being reasons assigned by judges and by other text writers, — may be found interspersed through the text and in the notes of the present series of chapters, and in the chapter in the first volume entitled "Marriage celebrated under Conflicting Laws;" but let a few others be added here: In this world of considerable dimensions, there is a wide field of choice laid open to persons as to where they will live. If a man and his wife choose to live in England, they may; if in Scotland, they may; and so on of all the other countries, scarcely excepting Japan. Now, if the status of matrimony is not to be determined, when the question is whether a marriage shall be dissolved or not, by the law, and consequently by the courts, of the country in which they live, but by those of some other country, then there is no country whose domestic affairs may not be constantly disturbed by any and every other country. And if a man and his wife have chosen to live in Scotland, — Is it "expedient," and do "the interests of humanity and justice" demand, that a tribunal in Massachusetts shall take the oversight of them, and divorce them whenever either of them does what would be a cause of divorce according to Massachusetts law? Suppose the woman wanted to play the harlot for a while; and, taking a fancy to the Americans, came to Boston for the purpose; a Massachusetts court might indeed, and very properly, punish her for the crime, — But with what propriety can a Massachusetts court decide, that she shall not thereafter be esteemed in law to be a wife in the place of her home? It seems to me, that, when a writer says the principle which allows the courts of a country wherein neither of the parties resides to divorce the parties at their pleasure, or under any circumstances whatever, has "the sanction of expediency," he is bound to tell us what kind of "expediency" it is which thus "sanctions" the intermeddling, by the tribunals of one country, in domestic matters pertaining to another country. And when he adds, that "the interests of humanity and justice" demand the intermeddling, he should tell us on what principle independent nations are, by their laws and through their tribunals, to administer justice and set up the humanities in each other's dominions.

4. To me, it does seem plain, that, if Massachusetts attempts to regulate the domestic relations of people residing in Scotland, or if Scotland attempts to regulate the domestic relations of people residing in Massachusetts, however much the regulating power may profess to be influenced by considerations of "expediency," of "humanity," or of "justice," the attempt will fail, unless the people among whom the process of being regulated is carried on, are first subjected to the dominion of the power which regulates, and therefore cease to be an independent power. In other words, the existence of two countries as independent the one of the other implies, *ex vi termini*, that each shall determine for itself when the band of mar-

riage shall be unloosed from a domiciled subject, and neither shall determine this question for the other. And when, in connection with this doctrine, it is also held, as it is by the American tribunals generally, that husband and wife may, for purposes of divorce, be domiciled in different countries, surely there can be no lack of justice to be complained of in the rule which refers the question to the domicile. If Mrs. Doe lives in Scotland, and does not like either her husband or the Scotch law, but likes Massachusetts and Massachusetts law, she is at liberty to come here; and, if she comes *bonâ fide, animo manendi*, and her husband has done what authorizes a divorce according to our law, she can, after remaining here five years, — in some other of our States she need not remain so long, — have her divorce. The Scotch tribunals can still hold her to be the wife of the Scotch husband if they choose — their liberty is not impaired — the Scotch law is not interfered with; and, if she came, as she professed, *bonâ fide*, to make her home in this new world, she is not harmed by the Scotch kink, however tight it may be twisted. Still, if an American could put a word in the ear of a Scotch judge, he would say: "Since the man who remains in Scotland has lost his wife, perhaps you might as well acknowledge the fact, and let him take another if he wishes."

CHAPTER XI.

SPECIFIC PROPOSITIONS AS TO THE LOCALITY IN WHICH DIVORCES DISSOLVING THE MARRIAGE ARE TO BE HAD.

SECT. 143. Introduction.

144-154. No Jurisdiction without Domicil.

155-170. Sufficient if one of the Parties is Domicilled.

171. Place of Offence committed immaterial.

172-179. Immaterial where domicilled when Offence was committed.

180-198. Immaterial where the Marriage was celebrated.

199. These Doctrines not in Conflict with United States Constitution.

§ 143 [720 a]. DESCENDING, therefore, from the general doctrine which refers the jurisdiction to the domicil, to an examination of specific propositions, let us look at each of the circumstances and facts which have been supposed by different tribunals, or which in the nature of things may seem adapted, to qualify the doctrine; thus bringing under our review both what has been decided, and what may be likely to arise hereafter for decision. The matter will be discussed in the order of a series of propositions, which seem to the writer to present the true doctrine.

§ 144 [721]. First. *The tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual, bonâ fide, domicil within its territory.* It is immaterial to this proposition, that one or both of the parties may be found temporarily within reach of the process of the court, or that the defendant appears and submits to the suit. This is the firmly established doctrine in England (so it was said in the
[126]

earlier editions of this work), and in the United States.¹ The reason on which this doctrine rests, is, that a government has no interest or power to change the matrimonial condition of strangers temporarily within its territory; and that, seeing every nation may determine the status of its own domiciled subjects, such interference by foreign tribunals would be an officious intermeddling in a matter with which they have no concern.² Obviously a judgment of divorce so rendered could not be binding in the country of the parties' domicil. Neither could it be binding in any third country; because, in such third country, the parties will be understood to have the status given to them, and continued in them, by the law of their domicil.

§ 145. It would seem however, that, notwithstanding the assured statement of the last section, concerning the English law, — the section being given here as it stood in the earlier editions, — the present judicial tribunals of the country are inclined to hold to the doctrine only when sitting upon the validity of a foreign divorce, not when considering whether to take for themselves the jurisdiction of a cause. Yet it is not easy to lay down, what, precisely, is the English doctrine,

¹ *Conway v. Beasley*, 3 Hag. Ec. 639, 5 Eng. Ec. 249; *Rex v. Lolley*, Russ. & Ry. 237, 2 Cl. & F. 268, note; *Sugden v. Lolley*, 2 Cl. & F. 567; *Ferg. Consist. Law App.* 13; *Fellows v. Fellows*, 8 N. H. 160; *Hanover v. Turner*, 14 Mass. 227; *Barber v. Root*, 10 Mass. 260; *Thompson v. The State*, 28 Ala. 12; *Ditson v. Ditson*, 4 R. I. 87, 93; *Pawling v. Bird*, 13 Johns. 192; *Jackson v. Jackson*, 1 Johns. 424; *Yates v. Yates*, 2 Beasley, 280; *House v. House*, 25 Ga. 473; *Dolphin v. Robins*, 7 H. L. Cas. 390; *Leith v. Leith*, 39 N. H. 20. In *Bradshaw v. Heath*, 13 Wend. 407, 422, *Savage, C. J.*, observes, that, in *Jackson v. Jackson*, both parties appeared, "and therefore the court had jurisdiction of the persons of the parties," but the divorce was held void because there was no jurisdiction over the subject-matter." s. f. in *Maguire v. Maguire*, 7 Dana, 181; *Pomeroy v. Wells*, 8 Paige, 406; *Tolen v. Tolen*, 2 Blackf. 407; *Freeman v. Freeman*, 3 West. Law Jour. 475; *White v. White*, 5 N. H. 476; *Harrison v. Harrison*, 20 Ala. 629; *Hare v. Hare*, 10 Texas, 355; *Vischer v. Vischer*, 12 Barb. 640.

² "The status of a stranger, as married or unmarried, divorced *a vinculo matrimonii*, or only separated *a mens et thoro* by judicial sentence for adultery, cannot be a matter of any concern to the law of the country before the tribunals of which he happens to be convened during a transient residence." Opinion of two of the judges, in *Duntze v. Levett*, *Ferg.* 68, 3 Eng. Ec. 360, 371.

now prevailing, upon the subject.¹ It will not be worth our while to attempt a minute examination of this matter.

§ 146 [722]. The doctrine under consideration was once expressed by Mr. Commissary Ross, a Scotch judge, as follows: "The right to regulate every thing regarding the status of its subjects is assumed, by the supreme power in every state, as inherent in itself, being connected with its most essential interests. It is vested there, as forming part of the *jus publicum* which attaches to all the real subjects of the state, independently altogether of their will. The status of majority, minority, and the like, is imposed by a state on all those truly subjected to it, without any act on their part indicating their consent. When they happen to go beyond the boundaries of the state by which any such status is imposed, into the territory of another state where the law regulating personal status is different, the law, or supreme will of the state in the country into which they enter, does not, it will be observed, stand in any degree opposed, as in the case of an ordinary contract, to what was fixed by the will of the individuals themselves; but stands opposed to the supreme will alone of the state by whom the status was attached. Now, in such a case, a state does not think herself entitled to arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject. A foreigner is not obliged, like a subject, to have his status or personal quality and interests tried by the law of a country to which he never intended to submit himself, and of which he is not a proper subject."² But this learned judge admitted, "that," to use his own language, "if it could be made out, that a refusal on our part [Scotland] to sustain adultery committed here, when regarded merely in a civil light, as a relevant ground of divorce

¹ See Vol. I, § 354; ante, § 131; Fras. Conf. Laws of Divorce, 46, et seq.

² Opinion in *Gordon v. Pye*, Ferg. 276, 327, 328, 3 Eng. Ec. 430, 461. S. F. in the opinion of the judges, in *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360, 371.

in every case, would be repugnant to the interests of morality among ourselves, this would compel us to sustain it.”¹

§ 147 [723]. The proposition in law is not a singular one, that parties are not permitted to litigate every question, in any jurisdiction, where a plaintiff may find a defendant. There must also be ground for taking cognizance of the subject-matter of the controversy.² The entire class of local actions is illustrative of this suggestion; and so are, on the other hand, actions *in rem*, maintainable where the court has no jurisdiction over the parties, but only over the subject-matter. Likewise, observes Lord Glenlee: “It is very extraordinary to bring an action in this country in order to ascertain a status to be held in another country. For instance, in the case of slavery, if the slave be in this country, we would not suffer him to be treated as such; but, if the master should be domiciled here, we could not sustain an action at the instance of the slave, who was resident in the West Indies, carried on by his mandatory, for declaring his freedom.”³

§ 148 [724]. Still, as to the law of Scotland, though these propositions have been maintained there with great ability by individual judges, and have been repeatedly ruled by the primary court, yet the court of appeal has as often reversed the ruling.⁴ The question seems to have never received the

¹ Opinion in *Gordon v. Pye*, Ferg. 276, 352, 3 Eng. Ec. 430, 476.

² See *Maguire v. Maguire*, 7 Dana, 181, 183.

³ *Duntze v. Levett*, Ferg. 68, 406, 3 Eng. Ec. 360, 508.

⁴ See the several cases of *Utterton v. Tewsh*, Ferg. 23, 3 Eng. Ec. 347; *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360; *Butler v. Forbes*, Ferg. 209, 3 Eng. Ec. 401; *Kibblewhite v. Rowland*, Ferg. 226, 3 Eng. Ec. 406. The last-mentioned case is very strong. The defendant husband went from London, where he was married and domiciled, on a pleasure excursion to Scotland, remaining in the country only six or seven weeks in all. He committed adultery there, and was cited by his wife, still remaining in London, in an action of divorce. Immediately on receiving the citation, he returned to London. The primary court at first declined to entertain the suit, as for a divorce from the bond of matrimony; offering however a divorce *a mensâ et thoro*, which was refused; but a divorce *a vinculo* was ultimately decreed

direct decision of the House of Lords, the tribunal of last resort.¹ Indeed the Scotch courts, from time immemorial, appear to have granted divorces without reference to the permanent domicile of the parties, or to the place where the marriage was contracted.² Nothing is ordinarily necessary to induce them to entertain the suit, but the service of process on the defender. The service may be by a personal citation, the moment he arrives in the country;³ or by a citation left at his dwelling-place, after a sojourn of forty days;⁴ though it has been said there must be a forty days' residence in all cases where the offence was committed abroad.⁵ It is not necessary the pursuer should even set foot in Scotland, if the defender has a sufficient abiding there;⁶ for the oath of calumny⁷ may be taken by commission.⁸ There is also an edictal citation, which may be resorted to where the pursuer resides in the country, and the defender is abroad.⁹

by order of the court of appeal. *Gordon v. Pye*, Ferg. 276, 3 Eng. Ec. 430. For a general review of these cases, see 2 Kent Com. 110-116; and, of these and other Scotch decisions upon the same point, see Hosack Conf. Laws, 257-285.

¹ In *Warrender v. Warrender*, 2 Cl. & F. 488, 552, 556, on appeal from Scotland to the House of Lords, the Scotch law was assumed in argument not to require a domicile in Scotland. But the case itself was one in which there was a Scotch domicile; and the point decided was, that, by the law of Scotland, the marriage celebrated in England might be dissolved by the Scotch courts. See also *Geils v. Geils*, 1 Macq. Scotch Ap. Cas. 255.

² 1 Burge Col. & For. Laws, 670.

³ *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360; *Kibblewhite v. Rowland*, Ferg. 226, 232, 3 Eng. Ec. 406, 408; *Conway v. Beazley*, 3 Hag. Ec. 639, 3 Eng. Ec. 242, 246.

⁴ *Duntze v. Levett*, and *Kibblewhite v. Rowland*, *supra*.

⁵ Mr. Fraser, however, says: "Residence of forty days has nothing to do with jurisdiction in cases of divorce. The popular notion and some loose practice gave it countenance, but it is without the sanction of judicial authority." *Fras. Conf. Laws of Div.* 61.

⁶ *Christian v. Christian*, 13 Scotch Sess. Cas. x. s. 1149; *Geils v. Geils*, *supra*. See *Forrister v. Watson*, 6 Scotch Sess. Cas. x. s. 1358.

⁷ *Ante*, § 31.

⁸ *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360, 378; *Orde v. Murray*, 8 Scotch Sess. Cas. x. s. 535.

⁹ *Wharton v. Mair*, Ferg. 250, 3 Eng. Ec. 415; *Warrender v. Warrender*, 2 Cl. & F. 488, 9 Bligh, 89.

§ 149. [724 a]. The foregoing propositions, as to when the Scotch courts will take jurisdiction, are subject to some qualifications, the exact extent of which could not be stated in any single proposition ; indeed the matter is not well defined in the Scotch authorities. The several questions, of the place of the marriage, the place of the *delictum*, the domicile of the parties at the time of the offence committed, the residence of each when the suit is carried on, are taken into the account. Where the parties were English, married and domiciled in England, and adultery was committed abroad, the Scotch court refused to sustain the cause, promoted by the husband, though he had resided forty days in Scotland, for the mere temporary purpose of giving the jurisdiction, his wife not accompanying him thither.¹ And where the marriage was in Scotland, but the parties were afterward domiciled in Ireland, and there the adultery was committed, after which the wife returned to Scotland, the husband still remaining in Ireland, it was held, that this husband so residing abroad could not sustain in Scotland his suit for divorce, without the forty days' abiding in Scotland.² But where a husband changed his domicile from Scotland to the United States, leaving his wife behind, and she afterward committed adultery in Scotland, the Scotch courts took jurisdiction over his divorce suit, while himself thus personally abroad. "I put my opinion," said the Lord Justice-Clerk, "upon the broad ground, that this party, having left his wife in Scotland — I do not say it would be different if he had sent her here, or if she had left him — finds, that in his absence she, resident in Scotland, has committed adultery in this country ; and I hold, that the husband has the undoubted right to proceed against her, in such a state of facts, in the courts of this country ; and I lay aside all consideration of his alleged domicile in America, as wholly immaterial. Nor do I think

¹ *Ringer v. Churchill*, 2 Scotch Sess. Cas. n. s. 307. Otherwise, where the marriage and adultery were in Scotland, and both the parties were there, though neither of them domiciled. *Shaw v. Shaw*, 13 Scotch Sess. Cas. n. s. 819.

² *Bennie v. Bennie*, 11 Scotch Sess. Cas. n. s. 1211.

his right could be excluded, although he might, by reason of such domicil, have proceeded against her in New York. The fact, that she is in Scotland and has committed adultery here, gives the husband in this case right to prosecute for dissolution of the Scotch marriage.”¹

§ 150 [725]. The grounds for entertaining the jurisdiction, by the Scotch courts, to dissolve marriages between parties domiciled in other countries, were stated by Lord Meadowbank, in a note reversing the interlocutor by which the court below had dismissed a suit of this kind, as follows: “The interlocutor complained of seems to hold, that the Scotch courts have no right to take cognizance of the conduct of foreigners in Scotland, respecting the relation of husband and wife, unless they have acquired a domicil in Scotland, *animo remanendi* there. But it is thought no warrant whatever can be produced for such a doctrine. Foreigners, equally with natives, are subjects of His Majesty, and to the law, while here; and, of course, under the protection of law. And those relations in which they stand towards one another, and which have been duly constituted before they came here, if relations recognized by all civilized nations, must be observed, and the obligations created by them fulfilled, agreeably to the dictates of the law of Scotland. If the law refused to apply its rules to the relations of husband and wife, parent and child, master and servant, among foreigners in this country, Scotland could not be deemed a civilized country; as thereby it would permit a numerous description of persons to traverse it, and violate with utter impunity all the obligations on which the principal comforts of domestic

¹ *Shields v. Shields*, 15 Scotch Sess. Cas. n. s. 142. And see further on this subject, *Forrester v. Watson*, 6 Scotch Sess. Cas. n. s. 1358; *Christian v. Christian*, 13 Scotch Sess. Cas. n. s. 1149; *Geils v. Geils*, 1 Macq. Scotch Ap. Cas. 255. Mr. Fraser says: “I am not aware of any case which has ever found, that, if a foreigner commit adultery abroad, then come to Scotland and there remain forty days, his foreign wife, who had never appeared in Scotland, could sue a divorce against him. Such a rule would be utterly indefensible, and such a rule is without support from Scotch decisions.” *Fras. Conf. Laws of Divorce*, 61.

life depend. If it assumed jurisdiction in such cases, contrary to the dictate of the interlocutor; but applied not its own rules, but the rules of the law of the foreign country, where the relation had been created; the supremacy of the law of Scotland within its own territories would be compromised, its arrangements for domestic comfort violated, confounded, and perplexed, and powers of foreign courts, unknown to our law and constitution, usurped and exercised. And though, according to the implied doctrine of the interlocutor, foreigners, by a permanent residence, were to have the rights belonging to them under those domestic relations protected by the law of Scotland, still a great proportion of persons would, according to that doctrine, remain without law in this matter. If they kept changing their dwellings sufficiently often, they might remain, like the gypsies of former times, at full liberty each to do that which was good in his own eyes. But it is thought the establishment of a domicile has no sort of connection with either the obligation to fulfil the obligatory duties of the domestic relations, or the competency of enforcing it. A person, the instant he sets his foot in Scotland, is as much bound to maintain his wife and child, as after forty days' residence there; and, if he turned them out of doors destitute, the first day he arrived, he is unquestionably as liable to be sued for aliment, adherence, &c., as if he had committed this outrage and resided forty days in one house. If not found in person to receive a citation, a domicile is of consequence; but it is of no consequence in such a case, if the foreigner is cited in person, or his residence is sufficiently ascertained. The *animus remanendi* may be of great consequence to establish the presumptions on which the distribution of succession in movables is supposed to depend; but it does not seem to enter into the constitution of a domicile for citation by forty days' residence, nor for many requisite for the validity of a personal citation to an action for obtaining redress of civil wrongs, more than for punishment of a crime. Nor can those suits for redress, which involve *questiones status*, admit of any different consideration. In all cases where the status claimed or decerned

is *juris gentium*, the competency of trying such, wherever the person concerned is found, is obviously necessary. The domestic relations concern so much the most immediate comforts of life and the well-being of society, that, where the parties concerned are present, it is impossible to leave to the Greek calends, as the interlocutor complained of does, the trying of them, without incurring the obloquy of a *denegatio justitiæ*.”¹ We have already seen, that this doctrine has not found favor either in England or the United States.²

§ 151 [726]. The cases in which the principal discussion has arisen, have been, where parties sought a divorce abroad for causes insufficient at home. In Scotland, indeed, some of the judges who opposed taking the jurisdiction to dissolve, between domiciled English persons, marriages celebrated in England, were still willing to give the complainant the remedy he would be entitled to in his own country; namely, the divorce *a mensâ et thoro*.³ Divorces from bed and board, however, are known to the laws of Scotland; and it is not apparent how any lawyer could entertain the suggestion, that a court may administer to foreigners a form of remedy which it could not to citizens. But aside from this, and, as a general proposition,—suppose the laws of each country alike authorize, for the offence complained of, a dissolution of the marriage; it is not clear how this fact alone could induce the court to entertain a suit for establishing a matrimonial status to be held in another country; the matter being local in its nature, that is, local to the place of the parties’ domicile. Yet if it should, under such circumstances, do so; and fairly pronounce, after due contestation, a sentence of divorce, untainted by collusion or other fraud; a difficulty might arise, and the question is not fully settled,

¹ *Utterton v. Tewsh*, Ferg. 23, 57, 3 Eng. Ec. 347, 357.

² *Ante*, § 141, 144.

³ *Duntze v. Levett*, Ferg. 68, 3 Eng. Ec. 360; *Butler v. Forbes*, Ferg. 209, 3 Eng. Ec. 401; *Kibblethwaite v. Rowland*, Ferg. 226, 3 Eng. Ec. 406.

whether the judgment would be heeded by the tribunals of the parties' domicil, and of other foreign countries.¹

§ 152 [726 *a*]. But looking to reason,— What authority of reason do we find sustaining the general Scotch doctrine, that the Scotch tribunals may entertain suits for divorce between parties neither of whom has a Scotch domicil? The view taken by the Scotch judges, that the Scotch courts should protect transient as well as permanent persons in their marital rights and relations, is very just. But the conclusion drawn from this view follows not from any correct line of argument. If a husband and wife are transiently in Scotland, plainly the courts should hold him criminally responsible when he beats his wife with a stick, even though he might lawfully use the stick upon her at home. But why should they undertake to say, for this offence, or for the greater offence of adultery, that he be deemed no longer her husband? They might indeed, if the local law gave the authority, say, that, during his stay in Scotland, he should not cohabit with her as his wife.

§ 153 [726 *b*]. But the divorce from the bond of matrimony extends, in its very nature and intent, far beyond the interest and the consequent authority of the power which governs in Scotland, over persons and things transiently in the country. Its object is, on its face and in its spirit, not to regulate parties while in the country, not to determine the status to be borne by them while in the country, but to fix their status and regulate their rights during their entire lives, while it is known their entire lives are to be spent out of Scotland; and their rights, as to each other, are thereafter to be controlled by laws elsewhere governing.

§ 154. Suppose the parties to be domiciled in the country at the time a divorce suit is commenced, but to remove afterward and before judgment out of the country,— Shall

¹ See 2 Kent Com. 109.

the court then conduct the case to judgment, or shall the case be dismissed? On principle, the case should be dismissed. And it is believed that this is the course proper to be pursued wherever there is no statute, which, either in words or in effect, forbids. But the statute of Indiana is in the following words: "Divorces may be decreed by the circuit courts of this State, on petition filed by any person who, at the time of the filing of such petition, shall have been a *bond fide* resident of the State one year previous to the filing of the same, and a resident of the county at the time of the filing such petition." And upon this the court observe: "We suppose this statute does not admit of any interpretation different from its literal reading; that, if the applicant was in good faith a resident, at the time named, non-residence at the time of trial would not prevent the court from acting in the premises."¹

§ 155 [727]. Secondly. To entitle the court to take jurisdiction, *it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such personal service cannot be made.*

§ 156 [731]. We have already had occasion to consider the proposition, that, for purposes of divorce, husband and wife may have separate domicils.² Having arrived, therefore, at this conclusion, we shall find no difficulty in settling, upon principle, that, as a question free from any statutory incumbrance, the courts of the actual *bond fide* domicil of either may entertain the jurisdiction. If it were not so, then both States, where the domicil of the one was in the one State and that of the other was in the other State, would be deprived of the right to determine the status of their own subjects; each must yield to foreign power in the management of its domestic concerns. A State would thus be compelled to refuse to redress the wrongs of a citizen; compelled

¹ *Waltz v. Waltz*, 18 Ind. 449, 450, opinion by Hanna, J. ² *Ante*, § 124 et seq.
[186]

to deny him, contrary to its own policy, the solace of actual married life; and to deprive itself of any increase of population which might result from the actual marriage of the citizen. The granting of a divorce by the one State, under these circumstances, does not interfere with the rights either of the other State, or of its apparently divorced subject. Probably the decree is not directly binding upon the person of such subject; unless he appears and answers to the suit, or, at least, has notice of it, served upon his person within the jurisdiction of the court rendering it. He is not necessarily bound by any collateral clause in it, as, that he pay alimony; and he only ceases to be a husband, because he has ceased to have a wife.¹ To this extent he would be affected, if she were to die without his being summoned to her bedside; or to suffer capitally for an offence, in the locality of her residence.² The government of the country of his domicile cannot complain; its laws and domestic policy are not interfered with; it may still prohibit him, if it chooses, from contracting a real marriage, the one dissolved having been nothing in fact but a sort of impediment to matrimony; and, if it can invent a way of causing a husband to exist without a wife, it can regard him still as being as much a married man as ever.

§ 157 [732]. The doctrine we are considering will hardly be disputed, in its application to cases where the suit is brought in the country of the domicile of the defendant, on whom notice has been duly served; and to cases where he has appeared and answered to the proceeding, in the country of the plaintiff's domicile.³ But the embarrassment is, where a plaintiff sues for a divorce in the courts of his own domicile, and no notice is, or can be, given to the defendant; except a publication in the newspapers, which he may never see, or a

¹ Vol. I. § 374; ante, § 142, note, par. 4.

² See Vol. I. § 639.

³ In the Scotch case of *Geils v. Geils*, 1 Macq. Scotch Ap. Cas. 36, 253, the defendant husband was residing in Scotland and the plaintiff wife in England, and the Scotch jurisdiction was maintained.

personal citation in the foreign jurisdiction, which legally amounts to no more than the publication; since the process of a court cannot run into the territory of a foreign government.¹ In the United States, unlike England and Scotland, it is practically impossible for a party to proceed in another State than the one in which he lives; because, in probably all, unless possibly we except Louisiana, there are either statutory provisions requiring the plaintiff to have resided within the State a certain number of years before he brings his suit, or there are other technical statutory impediments, tantamount in their effect to this. But nearly or quite all the statutes provide for notice by publication to absent defendants; and, unless the judicial tribunals give effect to each other's decrees rendered under these statutes, in favor of *bonâ fide* subjects, we shall be in a most distressing condition of conflict and confusion.²

§ 158 [733]. The question of the right of the courts to assume jurisdiction, when the defendant is domiciled abroad, could never in former times, it is presumed, have arisen in England; because there were in the way of such jurisdiction technical obstacles, having no relation to the merits of the case. It was always the theory of the ecclesiastical judicatories, that they interfere for the good of the souls of the defendants, who are corrected and brought right by their judgments; but a bishop could not undertake the care of a soul not domiciled, especially not present, within his diocese, much less of one domiciled and remaining out of the kingdom. Therefore it was common law in those courts,³ and it was afterward provided by a statute, that no person be cited out of his diocese.⁴ It has been held, however, that this

¹ *Harding v. Alden*, 9 Greenl. 140; *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 577; *Tolen v. Tolen*, 2 Blackf. 407; *Collett v. Collett*, 3 Curt. Ec. 726, 7 Eng. Ec. 563, 567; *Dunn v. Dunn*, 4 Paige, 425; *Ableman v. Booth*, 21 How. U. S. 506.

² And see ante, § 134.

³ 106th Canon of 1603, Gibs. Cod. 445, 446.

⁴ Stat. 23 Hen. 8, c. 9; *Collett v. Collett*, 3 Curt. Ec. 726, 7 Eng. Ec. 563, 564; *Rogers Ec. Law*, 2d ed. 779; *Ayl. Parer*. 182; *Carden v. Carden*, 1 Curt. Ec.

statute is merely for the benefit of defendants, who may waive the objection; and that third persons, as persons cited to see proceedings, cannot take advantage of it.¹ Besides, the English courts had no authority to dissolve valid marriages; and it may be doubted, whether a suit for separation from bed and board involves a question of status, within the principle we are considering. If it does, still no one would seek such a divorce under circumstances to give the decree no personal effect upon the defendant.

§ 159 [734]. It is a familiar general principle, that no person is bound by a judgment rendered in a jurisdiction to which he is in no way amenable, and in a proceeding to which he did not answer, and of which he had no notice either actual or constructive.² No wonder, therefore, dicta have fallen from judges who had no occasion to examine the subject in all its bearings, opposed apparently to the doctrine we are considering. Moreover it may be true, that a divorce obtained when the defendant was living in another country, without such publication or other notice of the suit as the case might admit of, would involve a species of fraud, which would avoid the judgment both at home and abroad.³ But the only American decision, which, aside from the dicta of the judges, is quite at variance with our position, appears to

558. However, in *Cooper v. Cooper*, Milward, 373, it was held, that the Statute does not extend to Ireland, and that the Canon does not apply to persons having no fixed residence. And the learned judge, Dr. Radcliff, said: "Of this declaratory statute it is to be observed, that it and its penalties only apply to the case of persons cited, who are inhabitants and dwellers in some *diocese* or *peculiar district*, and not to persons having no habitation at all." See also *Nixon v. The Office, Milward*, 390, note; *Dasent v. Dasent*, 1 Robertson, 800; ante, § 135.

¹ *Collett v. Collett*, supra; *Chichester v. Donegal*, 1 Add. Ec. 5, 17, 18; *Donegal v. Donegal*, 3 Phillim. 586, 597.

² *Flowers v. Foreman*, 23 How. U. S. 132; *Matter of Tracy*, 1 Paige, 580; *Matter of Pettit*, 2 Paige, 174; *Gray v. Hawes*, 8 Cal. 562.

³ *Bradshaw v. Heath*, 13 Wend. 407; *Harding v. Alden*, 9 Greenl. 140, 148. *Borden v. Fitch*, 15 Johns. 121, was a case of gross fraud. In *Maguire v. Maguire*, 7 Dana, 181, a fraud was attempted by the wife upon the jurisdiction, and neither party had a domicile in Kentucky, where the suit was brought. And see post, 161-164; *Vischer v. Vischer*, 12 Barb. 640; *Lyon v. Lyon*, 2 Gray, 367.

be that in *Irby v. Wilson*, rendered by the Supreme Court of North Carolina in 1837. The facts were, that persons intermarried in South Carolina, and removed thence to Tennessee, where they became domiciled. There the wife deserted the husband, and went to live in North Carolina, he still remaining in Tennessee. In due time he sued in the courts of his own State for the desertion, and obtained a decree dissolving the marriage; constructive, but not actual, notice having been served upon her by proclamations and publications, as directed by statute. This Tennessee divorce the North Carolina court held to be void; "because," in the language of Ruffin, C. J., "it was not an adjudication *between any parties*; since the wife did not appear in the suit, nor was served with process" (the court held, that there was no way in which she could be served, not being within the territory of Tennessee),¹ "and was not a subject of Tennessee, but was a citizen and inhabitant of this State, and therefore not amenable to her tribunals."² It will be observed, that, according to this decision, it would be impossible for either of the parties, whom the other had abandoned for a residence beyond the reach of the process of the court, to procure a divorce for any cause, whether it occurred before or after the desertion, or for the desertion itself.

§ 160 [735]. But there is no case in which this subject is more satisfactorily discussed, or settled upon a more broad, liberal, and just basis, than that of *Harding v. Alden*,³ which came before the Supreme Court of Maine in 1832. This, it is perceived, is of a date somewhat earlier than the North Carolina case; in which, however, it was not cited. It was an action for dower against the grantee of the husband, under a statute allowing the woman, after a divorce for the husband's adultery, dower in his lands, to be assigned in the

¹ See ante, § 157.

² *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568, 576. See also *Dorsey v. Dorsey*, 7 Watts, 349; *Vischer v. Vischer*, 12 Barb. 640; ante, § 134.

³ *Harding v. Alden*, 9 Greenl. 140.

same manner as if he were dead. The principal question was, as to the validity of a divorce decreed in the State of Rhode Island, on her petition alleging his adultery. The parties were married in Massachusetts, and were afterward domiciled in Maine. There he deserted her and took up his residence in North Carolina, where he entered into an adulterous connection. The wife removed from Maine to Rhode Island; and, in the latter State, applied for and obtained a divorce in its supreme Judicial Court. The husband was never within the territory of Rhode Island; but the citation was served upon him personally in North Carolina, a mode of service which the court considered to be no better for the purpose of founding jurisdiction than service by publication, since no tribunal can send its process into a foreign country.¹ The divorce was held to be good; and so the suit was sustained.

§ 161 [736]. The grounds upon which this decision was placed, were substantially those we have already discussed; though the principle was somewhat less eliminated in it, than in the foregoing pages. "It was," observed the court, the "interest" of the husband in his wife, "his right to exact from her the performance of duties, upon which the decree operated. She was within the jurisdiction. . . . Most of the reasons which led to the adoption of the rule, that a marriage valid by the law of the place where solemnized should be valid everywhere, the protection of innocent parties, and the purity of public morals, require, that divorces lawfully pronounced in one jurisdiction, and the new relations thereupon formed, should be recognized as operative and binding everywhere. To this may be excepted cases of fraud and collusion, which, when pleaded and verified, vacate all judgments and decrees. And of this class are decrees obtained in fraud of the law of the domicile of the parties. *Jackson v. Jackson* and *Hanover v. Turner*² were decided

¹ Ante, § 157.

² *Jackson v. Jackson*, 1 Johns. 424; *Hanover v. Turner*, 14 Mass. 227. See ante, § 159.

upon this ground." And the court mentioned the inconvenience which must result from refusing to give effect to such decrees; and showed, that it would amount to a denial of justice, except where the injured party could follow up the offender and become domiciled in his jurisdiction.¹ This decision has received the commendation of Chancellor Kent,² and the doctrine it lays down is what is best sustained by authority.³

§ 162 [736 a]. Since the first two editions of this work were published, cases have been decided in which the doctrine now under consideration has been more thoroughly discussed, and more firmly settled, than it had been when the foregoing sections were originally penned. Thus in a Rhode Island case, the court, by Ames, C. J., entered fully into the matter, and in an able opinion sustained throughout what has been laid down in this work upon this topic. The case was one in which the defendant was neither personally in the State nor personally cited; and the court, after full consideration of the subject, determined to take the jurisdiction to decree the divorce, on the express view that the divorce decreed would be, or should be, held to be binding throughout the world. After making the observations, concerning the nature of marriage, quoted in the early part of the first volume,⁴ this learned judge proceeded: "The right to govern and control persons and things within the State supposes the right, in a just and proper manner, to fix or alter the status of the one, and to regulate and control the disposition of the other; nor is this sovereign power over persons and things lawfully domiciled and placed within the jurisdiction of the State, diminished by the fact, that there are other parties interested through some relation in

¹ *Harding v. Alden*, 9 Greenl. 140.

² 2 Kent Com. 6th ed. 110, note.

³ *Mansfield v. McIntyre*, 10 Ohio, 27; *Tolen v. Tolen*, 2 Blackf. 407; *Hull v. Hull*, 2 Strob. Eq. 174; *Cooper v. Cooper*, 7 Ohio, 238; *Harrison v. Harrison*, 19 Ala. 499; *Gleason v. Gleason*, 4 Wis. 64; *Hubbell v. Hubbell*, 3 Wis. 662; *Thompson v. The State*, 28 Ala. 12; *Ditson v. Ditson*, 4 R. I. 87.

⁴ Vol. I. § 10.

the status of these persons, or by some claim or right in those things, who is out of the jurisdiction, and cannot be reached by its process. No one doubts this, as a matter of general law, with regard to the other domestic relations, and what special reason is there to doubt it, as to the relation of husband and wife? The slave who flees from Virginia to Canada, no treaty obliging his restoration; or who is brought by his master thence to a free State of the Union, no constitutional provision enforcing his return; finds his status before the law, in the new jurisdiction he has entered, changed at once; and no one dreams, that this result of a new domicile and the new laws of it, is less legally certain and proper as a matter of general law, because the master is out of the new jurisdiction of his slave, and is not, or cannot be, cited to appear and attend to some formal ceremony of emancipation. It is true that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race, and, as a relation, is nowhere so restrictive and so binding in its obligations as amongst the most truly civilized portions of it. Yet each nation and State has its peculiar law and policy as to the mode of forming, and the mode and causes for judicially dissolving, this last relation, according to its right; and all that other States or nations, under the general law which pervades all Christendom, can properly demand is, that, in the exercise of its clear right in this last respect as to its own citizens or subjects, it should pay all the attention, and no more, practicable, to the competing rights and interests of *their* citizens and subjects. It should give to non-residents and foreigners, parties to such a relation of general legal sanctity, as to persons of the like description interested in property within its territory, the rights to which are also everywhere recognized, at least such notice by publicity before it proceeds to judicial action as can, under such circumstances, be given consistently with any judicial action at all, efficient for the purposes of justice. To say that the general law inexorably demands *personal* notice in order to such action, or still

worse, demands that all parties interested in a relation or in property subject to a jurisdiction should be physically within that jurisdiction, is to lay down a rule of law incapable of execution, or to make the execution of laws dependent, not upon the claims of justice, but upon the chance locality, or, what is worse, upon the will of those most interested to defeat it.”¹

§ 163 [736 b]. There is also a late Alabama case, in which the matter is thoroughly examined, with the same result. The question arose on an indictment for polygamy, in which the defendant answered the charge by setting up a divorce in Arkansas. The court below instructed the jury to find the divorce void, if from the evidence they should believe, “that the defendant was married to Gracy D. Smith in Alabama, and removed to an adjoining county in Mississippi, and, while living in Mississippi, left his family, and went to the State of Arkansas, and there resided one year, and then instituted a suit in Arkansas for divorce against his wife, who never resided in Arkansas, and never had personal notice of the exhibition of the suit [there was the constructive notice, by publication in the newspapers]; and further believe from the evidence, that the cause of divorce commenced and existed beyond the State of Arkansas, and never was continued or completed within the State.” Yet the court of review held, that neither any one nor all of these things combined would make the divorce void. But, added the court: “If the defendant did not go to Arkansas *animo manendi*; or, if he went to that State merely for the purpose of obtaining a divorce, and intending to remain no longer than was necessary to accomplish his purpose; or, if the divorce was procured by fraud,—the decree of the Arkansas court would be void, and the appellant, in marrying again in this State while his former wife was living, would commit the crime of polygamy.”²

¹ *Ditson v. Ditson*, 4 R. I. 87, 102, 103.

² *Thompson v. The State*, 28 Ala. 12, 21, 22, opinion by Walker, J.

§ 164 [737]. Unquestionably it is a good general proposition, that, in the language of Thompson, C. J., "to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person, and of the subject-matter."¹ But the tribunals of a country in which any individual is domiciled have jurisdiction of the "subject-matter," namely, his status, and likewise of his person; and only upon this subject-matter do they act when they declare him free from the bond of matrimony with one abroad. Indeed, if it were necessary to go into the inquiry, probably we should find it to be a fundamental principle, controlling the entire question of all judicial jurisdiction, that the courts are bound to redress the wrongs of citizens, while the right of defendants to be cited is only secondary; that the ground on which tribunals refuse to entertain mere personal suits against foreigners upon whom no process can be served, is, not alone because they are entitled to notice, but because the proceeding could do the plaintiff no good; and that the true reason why the jurisdiction, when the property of the defendant can be seized, will be entertained to the extent of such property, is because the plaintiff will thereby and to this extent be benefited.² It is well known, that, in cases of proceedings *in rem* and *quasi in rem*, if they are free from fraud, the judgment binds the property of the defendant, whether he had actual notice or not.³ And surely a suit to fix the status of a citizen does not materially differ from a proceeding *in rem*. Indeed it is, in its nature, exactly a proceeding *in rem*; the thing being, not a ship or other piece of property, but a *status*.

§ 165 [738]. Perhaps also in respect to marriage, and upon other grounds than those already discussed, the legal identity of husband and wife, and their general duty of

¹ Borden v. Fitch, 15 Johns. 121, 141. Ayliffe lays it down, that "a citation is matter of natural right, introduced *ab origine mundi*; for," he argues, "*God cited Adam, saying, Adam! Adam! Where art thou?*" Ayl. Parer. 180. And see ante, § 147, 148, 151.

² See Sanford v. Sanford, 5 Day, 353.

³ Thompson v. Steamboat Morton, 2 Ohio State, 26.

remaining together, should result in the legal consequence, that each must defend his matrimonial status wherever the other has a domicile. Mr. Burge has some observations which may illustrate this subject. "It is not considered," he says, "that the citation is necessarily ineffectual for the purpose of giving the tribunal competent jurisdiction to proceed against the party, because he was not either actually or virtually present in the country at the time it was served. If the place in which the suit was instituted was that of his domicile, or if he was possessed of property there, he may be said to owe such allegiance and submission to its laws as to be subject to the species of citation which its laws have ordained; and it is in his power to secure to himself ample means of defending himself against the suit, by appointing a representative. A citation, therefore, under those circumstances, although at the time it takes place he may be absent from the country, is not necessarily so repugnant to the principles of natural justice that a foreign tribunal should refuse to recognize it, and treat a sentence founded on it as a nullity."¹

§ 166 [738 a]. There is no question, that, on general principles, aside from the operation of particular statutes, if the defendant is pursued for a divorce in the courts of his own domicile, he cannot object though the plaintiff is domiciled abroad.² But this doctrine is practically useless in this country; because of the fact, already mentioned, that the statutes of substantially all our States require a residence by the plaintiff in the State before he brings his suit. The requirement has been found important in order to prevent persons from rushing into particular States to obtain from the courts mere paper divorces; valueless, except to deceive and allure into void marriages other persons who are ignorant of the law, and who would not knowingly enter into a polygamous connection.

¹ 3 Burge Col. & For. Laws, 1056.

² And see *Thompson v. The State*, 28 Ala. 12, 17; ante, § 157.

§ 167 [738 b]. The foregoing discussion is perhaps sufficiently full, concerning the topic under consideration, important though it is; but a few words further may not be amiss. The relation of husband and wife can never be made a mere theoretical affair, a mere obstruction to actual marriage, without inflicting the deepest injury on the party innocent of offence, and violating all true public policy.¹ And this is a proposition applicable, not in particular countries and localities only, but applicable in all places, to the entire race of man, wherever man is found on the earth. And when one of the parties is domiciled in one country, and the other party is permanently out of the country, the marriage is a mere theoretical thing; it is not what the international law, in a wise contemplation of the interests of associated nations, should favor. It is an impediment to matrimony, not matrimony itself, as this relation is viewed by the just and true eye of that genius of international glory and peace and virtue which should ever preside over the jurisprudence of nations. It is also an impediment to matrimony, not matrimony, as viewed by the law of nature. And as viewed by the municipal law of the country in which the injured person lives, if the *delictum* recognized by such law as sufficient for a divorce has occurred, it is also a mere impediment to actual matrimony. We have, then, the three concurring voices, of natural law, of international law, of municipal law, all declaring the marriage to be truly a mere impediment to matrimony, not matrimony itself; all protesting against it, as injurious to the race, to the party, to the nation, to the community of nations; yet, in the face of all this, we have among us men learned in the law, who tell us, there is a technical reason why the impediment must forever remain, as a monument to human folly, a disgrace to the name of marriage, and a blot on the law.

§ 168 [738 c]. And the technical reason in the way is the want of personal citation of the defendant within the country.

¹ Vol. I. § 33, 796.

Yet when he violated his marital duties, he did what, and only what, prevents him from being in the same jurisdiction with the plaintiff, where he could be cited. In other words, the consequence of his wrong is the thing set up as his protection against being divorced for the wrong. If men can plead, either their own wickedness directly, or what flows directly from their wickedness, in bar of a prosecution for this wickedness, the principle is a new one; or, if it is an old one, it merits reprobation.

§ 169 [739]. But the doctrine we are discussing applies only to the matrimonial status, and to things resting directly upon the status. "In giving effect here to the divorce decreed in Rhode Island," said the court in *Harding v. Alden*, "we would wish to be understood, that the grounds upon which we place our decision limit it to the dissolution of the marriage. In the libel, alimony was prayed for; and certain personal property, then in the possession of the wife, was decreed to her. Had the court awarded her a gross sum, or a weekly or annual allowance, to be paid by the husband; and the courts of this or any other State had been resorted to to enforce it, a different question would be presented, falling within the distinctions which have been supposed to qualify the decisions of the Supreme Court of the United States." But the right to recover dower, though in lands aliened before the divorce, followed, in the opinion of the court, as a necessary consequence, under the statute law of Maine, upon the dissolution of the marriage by the decree of the foreign tribunal, the same as by death.¹

§ 170 [739]. This distinction, between the right or jurisdiction to dissolve the marriage, and to settle collateral matters concerning property, has been often recognized;

¹ *Harding v. Alden*, 9 Greenl. 140, 151. "No State or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others." Story Conf. Laws, § 20. But in respect to dower in such a case, see *Mansfield v. McIntyre*, 10 Ohio, 27, and the comment on this case in Page on Div. 369, note.

and it appears to be well founded in authority and in principle.¹ Where, however, the defendant, who is a citizen of another State, employs counsel and defends the suit, he can have no benefit under this distinction; and the court has power to decree alimony against him, although he is not personally within the State, and has no property there.² Still, the doctrine of this section and the last, has not yet been drawn in sufficiently distinct outline by the adjudications, to enable us to do more than announce it in this general way. It rests in part on the fact, that a judgment concerning a collateral matter of property would ordinarily not avail the plaintiff, unless he could get possession of the defendant's person or his goods; and in part on the legal truth, that the question of status dwells in different reasons from those which govern these collateral matters; so that the status may be within a jurisdiction while the collateral matters are not; the latter may be, while the former is not.

§ 171 [740]. Thirdly. *The place where the offence was committed, whether in the country in which the suit is brought or a foreign country, is immaterial.* This is the universal doctrine; it prevails alike in the English, Scotch, and American courts, and there is no conflict upon the point.³ There may however be cases, in which the place of the offence, coming up for consideration in an incidental way, has been deemed important in respect of the matter of jurisdiction; but even such cases are anomalous, and, on principle, this matter should always be wholly disregarded. If a man should go abroad to commit adultery, he would be just as unfit a companion for his wife, and the interests of society

¹ Maguire v. Maguire, 7 Dana, 181; Holmes v. Holmes, 4 Barb. 295, 301; Crane v. Meginnis, 1 Gill & J. 463; Townsend v. Griffin, 4 Harring. Del. 440; Vol. I. § 14, 693.

² Sanford v. Sanford, 5 Day, 353.

³ 1 Burge Col. & For. Laws, 680; 1 Fras. Dom. Rel. 658; Duntz v. Levett, Ferg. 68, 3 Eng. Ec. 360, 379; Harding v. Alden, 9 Greenl. 140; Clark v. Clark, 8 N. H. 21; Harteau v. Harteau, 14 Pick. 181; Thompson v. The State, 28 Ala. 12; Hanberry v. Hanberry, 29 Ala. 719; Ratcliff v. Ratcliff, 1 Swab. & T. 467, 470; Brodie v. Brodie, 2 Swab. & T. 259.

would just as much require the dissolution of the marriage, and private interest would clamor as loudly, as though he had committed the adultery in his own country.

§ 172 [741]. Fourthly. *The domicil of the parties at the time of the offence committed is of no consequence; the jurisdiction depending on their domicil when the proceeding is instituted, and the judgment is rendered.* A contrary doctrine has been maintained in New Hampshire and Pennsylvania; in which States it has been held, that the tribunals of the country where the parties were domiciled when the *delictum* occurred, have alone the jurisdiction.¹ And in a recent Louisiana case, the majority of the court refused to grant a divorce for drunkenness committed in another State where the parties were married and domiciled, before becoming domiciled in Louisiana. Campbell, J., observed: "We hold it to be sound doctrine, that parties who did not contract marriage under, or with reference to, the laws of this State, cannot base in our tribunals an action for divorce, on matters which occurred in another State, before they had acquired a domicil in this; although it may be competent, in a suit here, to offer evidence of such matters, as tending to establish the habit of which complaint is made."²

§ 173 [742]. The history of this doctrine, as it prevails, or did prevail, in New Hampshire and Pennsylvania, is instructive. It appears to be as follows: In Massachusetts, under the colonial system, divorces were granted by the Governor and Council.³ And when the Constitution of the State was adopted in 1780, it declared, that "all causes of marriage, divorce, and alimony . . . shall be heard and determined by the Governor and Council, until the legislature shall by law make other provision."⁴ This other provision was made in 1786, when the jurisdiction was committed to the courts

¹ Post, § 173-175.

² *Edwards v. Green*, 9 La. An. 317, Buchanan, J., dissenting. And see *Hare v. Hare*, 10 Texas, 355, 357.

³ *Gage v. Gage*, 2 Dane Ab. 309.

⁴ Chap. 3, art. 5. See Vol. I, § 688.

in these words : " Whereas it is a great expense to the people of this State to be obliged to attend at Boston upon all questions of divorce, when the same might be done within the counties where the parties live, and where the truth might be better discerned by having the witnesses present in court, *Be it therefore enacted, &c.*, That all questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court, holden for the county where the parties live, and that the decree of the same court shall be final."¹ But manifestly great difficulties of construction must arise under this statute, in cases where the parties had no permanent domicile, or where they had made a change of domicile from one county to another, or where they were living in different counties, or where only one of them was within the State ; for, while the letter of the statute would leave them no forum when both were not residing in the same county, its spirit and intent evidently aimed to facilitate divorce ; whence a strict construction could not be adopted ; neither, on the other hand, could the letter be disregarded. And the courts naturally endeavored to find some principle, or set of principles, to guide them in applying this enactment to the ever-varying circumstances in which the question from time to time presented itself. One proposition was obvious, that a wife could not lose her forum by the desertion of the husband, or any change of residence made by him alone, after the commission of the offence ; but, though in such a case she might proceed in the county where she continued to reside, yet it was not so clear she could gain, adversely to him, a new jurisdiction. These are observations applicable purely to the statute, and they have nothing to do with the general question.² Yet it is apparent, on a reference to the

¹ Stat. March 16 (chap. 69), 1786, § 3 ; *Harteau v. Harteau*, 14 Pick. 181.

² The following are some of the cases decided upon the construction of this statute : *Lane v. Lane*, 2 Mass. 167 ; *Richardson v. Richardson*, 2 Mass. 153 ; *Hopkins v. Hopkins*, 3 Mass. 158 ; *Squire v. Squire*, 3 Mass. 184 ; *Moore v. Moore*, 2 Mass. 117 ; *Merry v. Merry*, 12 Mass. 312 ; *Choate v. Choate*, 3 Mass. 391 ; *Anonymous*, 5 Mass. 197 ; *Harteau v. Harteau*, 14 Pick. 181 ; *Greene v. Greene*, 11 Pick. 410 ; *Carter v. Carter*, 6 Mass. 263. And see *Harding v. Alden*, 9

Pennsylvania¹ and New Hampshire² decisions, that such and similar observations from the Massachusetts court are the real source of their rule.

§ 174. In a late New Hampshire case, the court considered the New Hampshire rule, as stated in the last two sections, to be completely established by the decisions as a rule binding upon the court in cases wherein it is called upon to grant divorces; but the intimation is strongly made, that, as a rule of general jurisprudence, it is not correct; the true doctrine being, that the courts where the parties are actually domiciled, *bonâ fide*, at the time of the application for the divorce, have in all cases the rightful jurisdiction. This latter rule was therefore, by way of dictum, applied, where the question was upon the validity of an Indiana divorce; the parties having resided at the time of the *delictum* in New Hampshire. "Upon every view which can be taken of the case," said the judge, "the divorce in Indiana might be sustained in the courts of this State, if the fact appeared that the husband [who had obtained the divorce in Indiana notwithstanding the wife resided in New Hampshire, and had only constructive notice], at the time of the application and of the proceedings which resulted in the decree, was a *bonâ fide* resident of that State."³

§ 175 [743]. The ground of principle upon which, in Pennsylvania, this rule was put by Gibson, C. J., is, that "the person of the transgressor was not subject to our jurisdiction at the time of the fact."⁴ But the New Hampshire court

Greenl. 140. These adjudications were the foundation for the provisions in the Revised Statutes, c. 76, § 8-11. See Commissioner's Report, part 2, p. 121.

¹ Dorsey v. Dorsey, 7 Watts, 349; McDermott's Appeal, 8 Watts & S. 251; Hollister v. Hollister, 6 Barr, 449.

² Clark v. Clark, 8 N. H. 21; Fellows v. Fellows, 8 N. H. 160; Frary v. Frary, 10 N. H. 61; Greenlaw v. Greenlaw, 12 N. H. 200; Batchelder v. Batchelder, 14 N. H. 380; Smith v. Smith, 12 N. H. 80; Payson v. Payson, 34 N. H. 518.

³ Leith v. Leith, 39 N. H. 20, 41, opinion by Sawyer, J.

⁴ Dorsey v. Dorsey, 7 Watts, 349. "There is no question, that the courts here

does not require the person to have been thus subject; and a divorce was granted to a wife for an offence which the husband, after deserting her in New York, committed in another State where he was domiciled; she being then, and while the judicial proceedings were carried on, resident in New Hampshire. "Having lawfully come to reside here," observed Parker, C. J., "she was entitled to the protection of our laws; and, a violation of the marriage covenant having subsequently occurred, she, as a legal inhabitant, may well appeal to those laws for redress." In this case, the marriage had been celebrated in New Hampshire, a fact which probably did not influence the result.¹ In another New Hampshire case, the same learned judge employed the following language: "Whether it could have made any difference, had it been shown that the wife had no knowledge of the fact until after the husband removed into this State, we have not considered. Should a husband, after committing adultery while domiciled in one State, where that furnished sufficient cause of divorce, remove with his wife into another State, where a similar law existed, before the fact was known to her, it would certainly present a case of hardship if she was, by such removal, precluded from availing herself of the fact in either State; but in which she would be entitled to apply, if in either, is a question of some difficulty, and one which we need not discuss at the present time."²

have no jurisdiction of marital duties abroad." *McDermott's Appeal*, 8 Watts & S. 251.

¹ *Frery v. Frery*, 10 N. H. 61.

² *Clark v. Clark*, 8 N. H. 21. On a libel for divorce from bed and board, Mr. Justice Wilde observed: "Speaking individually, I should have no hesitation in saying, that a man may have two domicils in different States, or within separate jurisdictions, so as to be amenable to a process of this description in either. That a man may have two domicils for some purposes, although he can have but one for succession to personal property, is well settled in England and in other countries. *Somerville v. Lord Somerville*, 5 Ves. 750." *Greene v. Greene*, 11 Pick. 410, 415. And see ante, § 149. But be this as it may, there seems to be no foundation for the argument, that, because a man could have complained of a breach of matrimonial duty in his domicil of yesterday, he cannot, having omitted to do so, complain of the same thing in his domicil of to-day.

§ 176 [744]. Now it may be useful to consider, that there is probably not a single analogy in the law to sustain this New Hampshire and Pennsylvania rule. If the doctrine were, as it is not, that the *lex loci delicti* should govern,¹ then there would be the analogy of the criminal law. We shall see, in the proper place, that, in substance, the suit for divorce is a species of action of tort; but who ever heard of a court refusing to sustain an action either of tort or of contract on the bare ground, that the parties, at the time of the injury or breach, were *domiciled* in another jurisdiction? Then, is the right of every government to determine the status of its own subjects² limited or controlled by any such exception? We have seen, that a State is not bound to recognize at all the status of marriage in persons coming into it from other States and countries; and so, when it does, it should take the status as subject to any imperfections resulting from wrongs already committed, and apply its own rules in determining what are such imperfections.³ Indeed, every State must do so, or consequences of a very inconvenient as well as illogical nature will follow. To accept the foreign marriage, in persons coming from another domicile, and yield to it, adversely to the policy of our own law, a force beyond even what was accorded to it there, would be to carry the principle of comity so extremely erect as to give it a leaning the other way; while to import the foreign law of divorce would be to subvert our own. But what appears to be conclusive is, that the doctrine we are combating has not been received either in the other American States generally, or in England or Scotland; though the question has seldom been made matter of direct judicial discussion.⁴

¹ See ante, § 171.

² Ante, § 137 et seq.

³ Vol. I. § 367 et seq.; ante, § 139, 140.

⁴ *Lauder v. Vanghent*, Ferg. 250, 3 Eng. Ec. 414; *Gordon v. Englegraaf*, Ferg. 251, 3 Eng. Ec. 415; *Scott v. Boucher*, Ferg. 252, 3 Eng. Ec. 416; *Younge v. Cassa*, Ferg. 255, 3 Eng. Ec. 417; *Urquhart v. Flucker*, Ferg. 259, 3 Eng. Ec. 420; *Deane v. Deane*, 12 Jur. 63; *Collett v. Collett*, 3 Curt. Ec. 726, 7 Eng. Ec. 563, 565; *Tolen v. Tolen*, 2 Blackf. 407; *Schnauffer v. Schnauffer*, 4 La. An. 355; *Fishli v. Fishli*, 2 Litt. 337; *Hare v. Hare*, 10 Texas, 355; *Hubbell v. Hubbell*, 3

§ 177 [744 a]. And in Pennsylvania the legislature has interfered, by providing, that "it shall be lawful for the said several courts to entertain jurisdiction of all causes of divorce from the bonds of matrimony, for the causes of desertion as aforesaid, or adultery, notwithstanding the parties were, at the time of the occurrence of said causes, domiciled in any other State. *Provided*, That no such divorce shall be granted, unless the applicant therefor shall be a citizen of this commonwealth, or shall have resided therein for the term of one year, as provided for by existing laws." But the court has given this statute the strictest possible interpretation; holding, that the words "any other State" refer only to another State of our American Union.¹

§ 178 [744 b]. The incorrectness of this New Hampshire and Pennsylvania doctrine, that only in the country where the parties were domiciled at the time of the offence committed can the divorce for the offence be given, though one or both of them should afterward obtain a *bonâ fide* domicile in another country, appears also from some further considerations. If a married man, whose wife has committed an offence entitling him to a divorce, removes into another State or country, carrying with him his status of marriage, he should surely not be held to take a heavier burden of uncongenial status than he bore when he left his former home. In his former home, after the offence committed, he was simply a married man on condition subsequent, applying to his status a phrase familiar in the law of written instruments; that is, the marriage was to subsist or not, as afterward he should ask, or not, to have it annulled. If the courts of the new domicile undertake to make him, what he was not in the old, a married man unconditionally, they proceed in violation of the general law of their own country, in violation also of

Wis. 662. The case of *McNeil v. McNeil*, 3 Edw. Ch. 550, turned entirely upon the construction of the statute. See also *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Stokes v. Stokes*, 1 Miss. 324.

¹ *Bishop v. Bishop*, 6 Casey, 412, 416; Act of 26th April, 1850, § 5.

sound public policy, and in violation of private right and interest; because, according to their own general law, according to the dictates of the public policy adopted at home, and the broader public policy which controls the affairs of nations, according to the clamor of the private rights and interests of the injured party, whenever a sufficient *delictum* has occurred, as in this case a sufficient one has, the divorce should be decreed.

§ 179 [744 c]. And suppose the *delictum* were not esteemed cause of divorce in the former domicil of the parties, still the policy of the law of the new domicil equally demands the divorce. In the place of the new domicil, the parties must either live together, or violate a rule of good order by living separately. If they live together, compelled thus to do by the law, they are not dealt with on an equality with the other citizens of the country; if they voluntarily live apart, they set an example not calculated to promote, in its influence, virtue in the community. Suppose the innocent party refuses to live with the guilty one, in consequence of the guilt,—the latter, thus guilty, may compel, if she be the wife, the innocent to support her, and may likewise obtain from him a divorce, as for desertion. The foreign adultery, if adultery were her offence, could not be set up in bar of either the suit for necessities or the suit for divorce; because, if a divorce could not be given to the husband on the ground of this adultery, as being a matter beyond the cognizance of the courts, equally could neither the wife's divorce suit for desertion, nor the third person's suit for necessities furnished her, be barred by this adultery, thus existing as a thing beyond the cognizance of the courts. And these are merely specimens of the absurdities to which the doctrine under consideration must lead.

§ 180 [745]. Fifthly. *It is immaterial to this question of jurisdiction, in what country, or under what system of divorce laws, the marriage was celebrated.* This used to be undisputed doctrine in the English tribunals, when they were

called upon to administer the remedy of a separation *a mensâ et thoro*,—the only kind of divorce from a valid marriage, which, previous to the year 1858, they were invested with the authority to grant.¹ But it has been said to be also law in the English courts, that, since they could not dissolve *a vinculo* any marriage, foreign or domestic, they would under no circumstances recognize the validity of any foreign sentence, dissolving a marriage *celebrated in England*. Yet when we look into the authorities we find doubts arise, whether such is in fact the law of England.

§ 181 [746]. It is the immemorial usage of the Scotch courts, as already mentioned,² to decree divorces between parties present in Scotland, though domiciled in England or elsewhere abroad, for any offence sufficient by the Scotch law; if only, as a general rule, the tribunal has a mere temporary jurisdiction over the parties, and process is served on the defender. And so it happened in one instance, that, after a divorce *a vinculo* had been rendered in Scotland between English subjects still domiciled in England, in which country also the marriage had been celebrated; and after the husband had entered into a second marriage; he was indicted at home for polygamy, and in answer to the indictment he set up the Scotch divorce. But he was convicted. "The judges," in the words of the brief report we have of the proceeding, "held the conviction right; being unanimously of opinion, that no sentence or act of any foreign country or State could dissolve an English marriage *a vinculo matrimonii*, for ground on which it was not liable to be dissolved, *a vinculo matrimonii*, in England."³ This case, often cited, and familiarly

¹ *Sinclair v. Sinclair*, 1 Hag. Con. 294, 4 Eng. Ec. 412, 413. It has been intimated, however, that divorces *a mensâ* do not stand on the same footing in this respect as divorces *a vinculo*. See *Greene v. Greene*, 11 Pick. 410; post, § 200 et seq.

² Ante, § 148, 149.

³ *Rex v. Lolley*, Russ. & Ry. 237, 2 Cl. & F. 567, note, A. D. 1812. Lord Brougham, who was counsel for the prisoner, stated the next year before the House of Lords, while arguing as counsel the case of *Tovey v. Lindsay*, 1 Dow. 117, 127, that he had a note of Lolley's case, taken by himself at the time the

known as *Lolley's case*, is the sole foundation for the opinion, that the English law cannot acknowledge, as valid, any dissolution in a foreign country of an English marriage. But it is seen, that the facts in issue in this *Lolley's case* furnished no basis for such an adjudication; and that, if words covering the point were employed by the judges, they are necessarily mere *dicta*. The point could not arise.¹ Besides, the rule is familiar, that the language of judges must be construed with reference to the facts they are discussing; a rule which should never be lost sight of, if we would avoid endless confusion, contradiction, nonsense.² And Lord Brougham has since observed of this case: "Though the decision was not put upon any special circumstance, yet, in fairly considering its applications, we cannot lay out of view, that the parties were not only married, but really domiciled, in England; and had resorted to Scotland for the manifest purpose of obtaining a temporary and fictitious domicile there, in order to give the Scotch courts jurisdiction over them, and enable them to dissolve their marriage."³

§ 182 [747]. The next case after *Lolley's* was that of *McCarthy v. Decaix*, before the Court of Chancery; and, in this case, according to the reports we have of it, the question we are discussing did arise. The marriage had been celebrated in England; the husband being a Dane by birth, fortune, and domicile; and the wife an English woman. The parties afterward removed to Denmark, where they were domiciled and divorced; and the point presented was, whether the Danish divorce dissolved the marriage, so as to affect, as against her representatives, property rights in England; to which country she had returned after the di-

judgment was delivered; as follows, that the judges "were unanimously of opinion upon the points reserved, that a marriage solemnized in England was indissoluble by any thing except an act of the legislature."

¹ See the observations of Lord Bannatyne in *Duntze v. Levett*, Ferg. 403, 3 Eng. Ec. 506.

² And see Vol. I. § 63.

³ *Warrender v. Warrender*, 2 Cl. & F. 488, 541.

voiced, and had died there. Lord Eldon hesitated; and said he would not take it as settled by Lolley's case, that the marriage was not, even for English purposes, ended by the Danish divorce. But Lord Brougham, who, before the cause was finally disposed of, succeeded to the great seal, held, — on the sole authority of Lolley's case, and without adverting to the difference we are considering in the facts, — that the Danish divorce must be viewed as ineffectual to dissolve the marriage.¹ Yet the weight of this decision, as bearing upon the point adjudged, is more than taken away by the subsequent observations of the same learned judge in the House of Lords, sitting as a court of Appeal from Scotland, in *Warrender v. Warrender*, to which case we shall presently refer.²

§ 183 [748]. After the decision in *McCarthy v. Decaix*, during the same year, the case of *Conway v. Beazley* came before the Consistory Court of London. It was a cause of nullity, promoted by a woman who in Scotland had entered into matrimony with a man divorced there from an English marriage, while both parties to the divorce remained domiciled in England. Dr. Lushington held the Scotch sentence null, and so the second marriage void. "My judgment, however," he observed, "must not be construed to go one step beyond the present case; nor in any manner to touch the case of a divorce pronounced in Scotland between parties who, though married when domiciled in England, were, at the time of such divorce, *bonâ fide* domiciled in Scotland; still less between parties who were only on a casual visit in England at the time of their marriage, but were then, and at the time of the divorce, *bonâ fide* domiciled in Scotland." And he considered Lolley's case to have settled the question no further than as concerns persons domiciled in England at the time of the Scotch divorce. It did not establish,

¹ *McCarthy v. Decaix*, 2 Russ. & Myl. 614, 2 Cl. & F. 568, note, 3 Hag. Ec. 642, note, 5 Eng. Ec. 244, A. D. 1831.

² *Warrender v. Warrender*, 2 Cl. & F. 448; ante, § 141; post, § 185, 190, 191.

as a universal rule, that an English marriage could not be dissolved judicially in Scotland. "Before I could give my consent to such a doctrine," he said, "(not meaning to deny that it may be true), I must have a decision, after argument, upon such a case as I will now suppose; namely, a marriage in England, the parties resorting to a foreign country, becoming actually, *bona fide*, domiciled in that country, and then separated by a sentence of divorce pronounced by the competent tribunal of that country. If a case of that description had occurred, and had received the decision of the twelve judges, or the other high authority to which allusion has been made, then indeed it might have set this important matter at rest; but I am not aware, that that point has ever been distinctly raised, and I think I may say with certainty, that it never has received any express decision."¹

§ 184 [749]. Besides the foregoing cases, are two others, which came before the House of Lords on appeal from Scotland. The first is *Tovey v. Lindsay*; it was argued in 1813, the next year after *Lolley's* case was decided. The husband was originally a Scotchman, and the wife an English woman; but the marriage was celebrated under the English law, at Gibraltar; and the parties were afterward domiciled in England, where a separation by deed took place. After this separation, the husband brought, in the Scotch court, his suit for divorce, on the ground of his wife's adultery; she objected to the jurisdiction, but her objection was overruled, and she appealed to the House of Lords. It appeared, before the latter tribunal, that probably his domicile still remained in England; but, because there was doubt upon this and other questions of fact, and because the case seemed not to have been carefully and accurately considered in the court below, the Lords remitted it back, for the Scotch court to review its own decision, and to present all the points for a final adjudication. No real light upon the main question

¹ *Conway v. Beazley*, 3 Hag. Ec. 639, 5 Eng. Ec. 242. A note of *McCarthy v. Decaix* was read by counsel in the argument of this cause.

was elicited, though there was some general discussion.¹ Before any thing further was done, Lindsay died; and so the suit ended.²

§ 185 [750]. The remaining case is *Warrender v. Warrender*, which terminated in 1835, subsequently to all the cases before mentioned. The husband was a Scotchman, married in England to an English woman. After the marriage, the parties were domiciled in Scotland; then they lived, were perhaps domiciled also, in England, where a separation by deed took place; then the husband returned to and was domiciled in Scotland, while she went and resided abroad. In this state of things he brought a suit, in the proper Scotch court, against her for divorce; she appeared, and objected to the jurisdiction; the Scotch tribunal overruled her objection, and, on appeal to the House of Lords, its decision was affirmed. This case is conclusive as to the Scotch law, but not as to the English; for the Lords proceeded on the doctrine, that, sitting as a court of appeal from Scotland, they must decide according to the law of Scotland; and it clearly appeared, that, viewed in this way, the judgment below was correct.³ Yet it is seen, that this decision does not absolutely conclude any thing, even for Scotland, in respect to cases where the parties at the time of the divorce suit are domiciled in England. Still if the Scotch law is to be applied, there may be difficulty in saying, that the right to decree divorces in such circumstances is not established by an exceedingly formidable array of domestic adjudication, embracing decisions of the highest domestic tribunal, acquiesced in from time immemorial; though, on the other hand, these decisions have not been given with the unanimous assent of the Scotch judges.⁴

§ 186 [751]. But if the House of Lords, as the common

¹ *Tovey v. Lindsay*, 1 Dow. 117.

² Lord Lyndhurst, in *Warrender v. Warrender*, 2 Cl. & F. 488, 565.

³ *Warrender v. Warrender*, 2 Cl. & F. 488.

⁴ *Ante*, § 146.

court of appeal from both England and Scotland, is to decide upon this subject in one way when the question comes from Scotland, in another way when it comes from England, then the picture drawn by Lord Lyndhurst is one of life and reality. "It must be admitted," he said, "that the legal principles and decisions of England and Scotland stand in strange and anomalous conflict on this important subject. As the laws of both now stand, it would appear that Sir George Warrender may have two wives; for, having been divorced in Scotland, he may again marry in that country; he may live with one wife in Scotland most lawfully, and with the other equally lawfully in England; but only bring him across the border, his English wife may proceed against him in the English courts either for restitution of conjugal rights, or for adultery committed against the duties and obligations of the marriage solemnized in England; again, send him to Scotland, and his Scotch wife may proceed, in the courts of Scotland; for breach of the marriage contract entered into with her in that country."¹

§ 187 [752]. Yet surely his lordship need have entertained no embarrassing apprehensions in the matter. Sir George Warrender's plain legal duty was to follow up the course which lies at all times open to every lover of oriental customs. Such a one may marry in England; get divorced in Scotland; and, in the latter country, contract a second marriage. Having done so, he should so construct his dwelling as to have two opposite wings for his respective wives, locating it where the line between the two countries will divide them. He should put the Scotch wife on the Scotch side, and the English wife on the English side; and, if the principles we are examining are adhered to, he will in both countries be alike a good citizen and a good Christian, so pronounced by one common superior tribunal. True indeed, if his wives, better skilled in household duties than in legal lore, should chance to interchange places but for a day, he

¹ Warrender v. Warrender, 2 Cl. & F. 488, 560.

would at once be transformed into a felon in both countries, pursued by the authorities of both, under the approval of one ultimate tribunal. This little inconvenience he should avoid by marrying intelligent women; who would be prompted to aid him in the discharge of his onerous legal, moral, and social duties, by their natural desire for the legitimacy of their offspring.

§ 188 [753]. The reason assigned why an English marriage cannot for English purposes be dissolved by the tribunals of the country in which the parties are afterward domiciled, is, that, since by the law of England as it existed when this reason was given, no judicial dissolution of the marriage could be allowed, the parties must be presumed to have agreed, when contracting matrimony, never to be separated by any judicial authority. Judge Story has thus summed up the reasoning on this side of the question: "The law of the place where the marriage is celebrated, furnishes a just rule for the interpretation of its obligations and rights, as it does in the case of other contracts, which are held obligatory according to the *lex loci contractus*. It is not just, that one party should be able at his option to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed. If any other rule than the *lex loci contractus* is adopted, the law of marriage, on which the happiness of society so mainly depends, must be completely loose and unsettled; and the marriage state, whose indissolubility is so much favored by Christianity, and by the best interests of society, will become subject to the mere will, and almost to the caprice, of the parties, as to its duration. The courts of the nations whose laws are most lax on this subject, will be constantly resorted to for the purpose of procuring divorces; and thus, not only frauds will be encouraged, but the common cause of morality and religion be seriously injured, and conjugal virtue and parental affection become corrupted and debased. Thus, a dissatisfied party might resort to one foreign country, where incompatibility of temper is a ground of divorce; or to

another, which admits of divorce upon even more frivolous pretences, or upon the mere consent of both, or even of one, of the parties.

§ 189 [754]. "In this manner a nation may find its own inhabitants throwing off all obedience to its own laws and institutions, and subverting, by the interposition of a foreign tribunal, its own fundamental policy. Nay, a stronger case may be put, of a marriage, deemed, as a sacrament, indissoluble by the public religion of a nation, which is yet dissolved at the will of a foreign nation, in violation of the highest of all human duties, a perfect obedience to the Divine law. There is no solid ground upon which any government can be held to yield up its own fundamental laws and policy, as to its own subjects, in favor of the laws or acts of other countries. Parties contracting in a country where marriage is indissoluble, voluntarily submit to the jurisdiction and laws of that country, if they are foreigners domiciled there. If they are natural subjects, they are bound by the laws of the country in virtue of the general duty of allegiance. Why then should England permit her subjects, by a foreign domicile, to escape from the indissolubility of a marriage contracted in England, and thus permit them to defeat a fundamental policy of the realm?"¹

§ 190 [755]. But though the case of *Warrender v. Warrender*² decided, as we have seen, nothing concerning the English law, yet observations were made in it, particularly by Lord Brougham, going far to shake the position, that the *lex loci contractus* would be held to govern, even in England; and they are conclusive, in principle, against this position. Having adverted to the doctrine which holds the validity of the marriage to depend on the law of the country of its solemnization, this learned person continued: "But it is said, that what is called the *essence* of the contract must also be

¹ Story Conf. Laws, § 225, 226.

² *Warrender v. Warrender*, 2 Cl. & F. 488.

judged of according to the *lex loci*; and, as this is a somewhat vague, and for its vagueness a somewhat suspicious, proposition, it is rendered more certain by adding, that dissolubility or indissolubility is of the essence of the contract. Now I take this to be really *petitio principii*. It is putting the very question under discussion into another form of words, and giving the answer in one way. There are many other things which may just as well be reckoned of the essence as this. If it is said, that parties marrying in England must be taken, all the world over, to have bound themselves to live until death or an Act of Parliament 'them do part,' — why shall it not also be said, that they have bound themselves to live together on such terms, and with such mutual personal rights and duties, as the English law recognizes and enforces? Those rights and duties are just as much of the essence as dissolubility or indissolubility; and yet all admit, all must admit, that persons married in England and settled in Scotland will be entitled only to the personal rights which the Scotch law sanctions, and will only be liable to perform the duties which the Scotch law imposes. Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from Turkey, into England, a marriage of such a nature as that it is capable of being followed by, and subsisting with, another; polygamy being there of the essence of the contract. The fallacy of the argument, 'that indissolubility is of the essence,' appears plainly to be this: it confounds incidents with essence; it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract, and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the country where the parties reside, and where the contract is to be carried into execution.

§ 191 [756]. "But," continued he, "at all events this is clear, and it seems decisive of the point, that if, on some such ground as this, a marriage indissoluble by the *lex loci* is to be held indissoluble everywhere; so, conversely, a marriage dissoluble by the *lex loci* must be held everywhere dissoluble. The one proposition is in truth identical with the other. Now, it would follow from hence, or rather it is the same proposition, that a marriage contracted in Scotland, where it is dissoluble by reason of adultery or of non-adherence, is dissoluble in England, and that at the suit of either party. Therefore a wife married in Scotland might sue her husband in our courts for adultery or for absenting himself four years, and ought to obtain a divorce *a vinculo matrimonii*. Nay, if the marriage had been solemnized in Prussia, either party might obtain a divorce on the ground of incompatibility of temper; and, if it had been solemnized in France during the earlier period of the revolution, the mere consent of the parties ought to suffice for dissolving it here. Indeed, another consequence would follow from this doctrine of confounding, with the nature of the contract, that which is only a matter touching the jurisdiction of the courts, and their power of dealing with the rights and duties of the parties to it,—if there were a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in *pais* to separate, every other country ought to sanction a separation had in *pais* there, and uphold a second marriage contracted after such a separation.¹ It may safely be asserted, that so absurd a

¹ "If," it was remarked in a Scotch case, "all who marry in any other country must bring home, when they return to Scotland, the laws of divorce from each place of celebration, as essential qualities of their conjugal relation, we must, instead of one rule, have all the incongruous regulations of the rest of the world on the subject of divorce, established in the municipal law of Scotland, as to individuals, or as to classes of our countrymen or fellow-citizens. The inconveniences of so unpleasant a situation must be endured, too, according to this hypothesis, for the sake of foreign systems, with which these very parties have no longer the slightest connection, and which can derive no possible benefit from our preference.' *Edmonstone v. Lockhart*, Ferg. 168, 193, 3 Eng. Ec. 389, 397.

proposition never could for a moment be entertained; and yet it is not like, but identical with, the proposition upon which the main body of the appellant's argument rests, that the question of indissoluble or dissoluble must be decided in all cases by the *lex loci*." ¹

§ 192 [757]. Assuming marriage to be every way a contract, even then it is difficult to sustain the conclusion, that, therefore, if it is indissoluble under the municipal law of the place where it is entered into, it must be so everywhere else and forever. One of the properties inherent in an ordinary contract is, that those who are interested in it may mutually abrogate it at pleasure; and, if this seems not to be so in respect to marriage, it is because the community wherein the married persons dwell is a party interested; ² but the interest of the particular community ceases, and a new one attaches, when they remove into a new jurisdiction. When they have left the country where the contract was originally made, the *lex loci contractus*, which cannot go with them, does not restrain them from mutually discharging it; yet the doctrine would be a novel one, that the consent of the defendant could, under any such circumstances, affect the plaintiff's right to a divorce. Moreover, as between themselves, since they can *consent* to annul the contract, they can consent to place it under the control of the laws of a new domicile; which they do upon their change of residence. Therefore, in an American court it was observed: "The laws of a country where a marriage is contracted form no part of the contract of marriage. By a contract, always implied, between the government and the community, *each member agrees to submit to laws made for the whole*, and the husband and wife are as much bound by this implied contract as each individual is. If they elect to abandon France, their native country, and to take up their residence in Missouri, they thereby enter into an implied contract with the State of Missouri, that the

¹ Warrender v. Warrender, 2 Cl. & F. 488, 532, 9 Bligh, 89.

² Post, § 231, 234.

property, left undisposed of on the death of one of the parties, shall be disposed of agreeably to the general law of the land. It would be as unreasonable for such persons to introduce the laws of France here to regulate the descent and distribution of their property, as for a native of France, who had abandoned his country at the age of maturity, when the implied contract between him and his country was in full vigor, to bring along with him the laws of France to be tried under, if it should ever so happen that he committed murder within the jurisdiction of Missouri. The argument derived from the indissolubility of the marriage contract by the mere act of the parties has as little weight in it.”¹

§ 193 [758]. We have seen, however, that marriage, truly viewed, is not a contract, but a status; that it bears indeed

¹ Tompkins, J., in *The State v. Fry*, 4 Misso. 120, 198. A learned Scotch judge has observed: “By marrying in England, parties do not become bound to reside for ever in England, or to treat one another in every other country where they may reside according to the provision of the law of England. Their obligation is to fulfil the duties of husband and wife to each other, in whatsoever country they may be called to in the course of providence; and they neither promise, nor have power to engage, that they shall carry the law of England along with them, to regulate what the duties and powers are which they shall fulfil and exercise, or the redress which the violation of those duties, or abuse of those powers, may entitle to. All of these functions belong to the law of the country where they may eventually reside, and to which they unquestionably contract the duties of obedience and subjection whenever they enter its territories. And, further, this supposed condition, even if it had the will of the parties in favor of it by any stipulation, however express, could derive no force from that circumstance. It is too obvious to admit of doubt, that no quality can be created in the relation of husband and wife by positive or implied agreement. The Commissaries certainly would not dismiss an action of divorce because the parties, at intermarrying, had in the most formal manner renounced the benefit of it, and become bound that their marriage should be indissoluble. Nor would it be any objection to a divorce, at the instance of a Roman Catholic, that his marriage was to him a sacrament, and therefore, by its own nature, indissoluble. These are all *pacta privatorum*, and cannot impede or embarrass the steady, uniform course of the *jus publicum*, which, with regard to the rights and obligations of individuals affected by the three great domestic relations, enacts them from motives of political expediency and public morality, and nowise confers them as private benefits resulting from agreements concerning *meum et tuum*, which are capable of being modified and renounced at pleasure.” Opinion of Mr. Commissary Ross, Ferg. 359, 3 Eng. Ec. 480.

somewhat of resemblance to a contract, merely from the fact of the government never imposing it upon any who do not mutually choose to assume it, the choice being expressed by what is called an agreement of present marriage; but that, when the status is once assumed, the contract has exhausted itself, is merged, no longer exists.¹ From this principle therefore it necessarily results, that the status is continually subject to the law of the domicile; by which law it may be from time to time modified or annulled, without reference at all to the law of the place of the exhausted contract. Indeed, if English parties are married at home, and remove to this country, they are recognized here as husband and wife by virtue, not of the English law, but of our own law; for the law of a foreign country cannot have force here.² And, said Lord Glenlee, "we give the remedy of divorce for adultery, because the parties are husband and wife, and not with relation to the constitution of the marriage."³

§ 194 [758 a]. The sovereignty of every government within its own dominions is necessarily full, and exclusive of all other sovereignty. And when parties go into a country, they cannot claim, if disposed to claim, any better standing before the law than citizens have, who were born in the country. Suppose an ordinary contract to have been made between them out of the country, the courts of the new locality will not enforce it, if repugnant to the policy of their own law. When indeed it is not repugnant, they will enforce it; and they will look to the law of the place where it was made to settle the questions of its interpretation, and of its having been so entered into in point of form as to be deemed a contract at all. For example, if a man in the United States, before we had a stamp act, should have given another an unstamped promissory note, and then the parties should have removed to England, the contract would there be sacred

¹ Vol. I. § 1-19.

² Story, Conf. Laws, § 23. And see Vol. I. § 367, 369; post, § 139.

³ Ferg 405, 3 Eng. Ec. 507.

and enforceable in the tribunals, though such a note given in England would be void for the want of a stamp. But if one of them had agreed to sustain the status of slave to the other, even in a State, if such a State there is, whose laws would acknowledge the agreement to be binding; and the two had removed to England, English law would not enforce the agreement. The reason of the distinction is, that the one contract accords with the policy and spirit of the English law, though not made in English form, while the other is repugnant to them.

§ 195 [758 b]. The propositions of the last section are conclusive of the right of the tribunals of every country to dissolve marriages celebrated abroad, without reference to the foreign law of divorce, whether marriage be deemed a contract or a status. For surely neither contract nor status, established abroad, can override the domestic law, without putting the domestic forum into foreign chains.

§ 196 [758 c]. But if marriage is to be deemed, as in every tribunal it is deemed, a thing of international law, then the courts of every country must hold the citizens of a foreign country to be married or single, according as they are held to be the one or the other in the country of their domicil. And for our tribunals to make an exception to this proposition, and say they will not follow it in cases of marriage originally celebrated in our country, is to make the attempt, futile and vain and arrogant and absurd, to impose our law upon a foreign country, when we should spurn the attempt of the same country to impose its law on us. But suppose the parties were once citizens of our own country,—Should not their allegiance to us be perpetual, and, if perpetual, does not the result follow, that we cannot recognize the foreign divorce? Not at all; for, even were we to hold to perpetual allegiance, the allegiance is a personal service due to the government, not a matter of status. Yet again, suppose the divorced person becomes, after the divorce, once more a citizen of our country,—Are we not then to inquire,

whether the former husband or wife has received the release of our own tribunals, from the marital contract entered into here? Certainly not; because we should violate all rules of law to hold a man to be either unmarried, or to be the husband of a particular woman, the moment before he changes his domicil, and to hold him to be the husband of another woman the moment after.

§ 197 [759]. Yet Gibson, C. J., in a Pennsylvania case, said, that the indissolubility of an English marriage by a foreign sentence is "an unavoidable consequence of the British tenet of perpetual allegiance." He added: "Though an English subject acquire a foreign character from a foreign domicil, insomuch as to be treated as an alien for commercial purposes; though he formally renounce his primitive allegiance, and profess another; he is accounted but a sojourner while abroad, and England, by the dogma of her government, is his home and his country still. Holding this dogma, it would be strange did she tolerate foreign interference with his domestic relations within her pale. Insisting on jurisdiction of his person, absent or present, she necessarily regards an attempt to change any one of these as an invasion of her sovereignty; and in that respect it cannot be denied, that the matter is within her province and her power; for, though the status of marriage is *juris gentium*, the institution is undoubtedly a subject of municipal regulation. And it is this perpetual allegiance to the country, its institutions, and its laws, not an indissolubility of the marriage from the presumption, will, and reservation of the parties, which is the root of the English doctrine."¹ Upon this view of the matter Hosack, in his treatise on the Conflict of Laws of England and Scotland, has remarked: "The theory of applying to this case the English doctrine of perpetual allegiance is clearly erroneous. If it were correct, it would apply with equal force to marriages contracted by English minors, who

¹ *Dorsey v. Dorsey*, 7 Watts, 349, 351; s. p. by Walker, J., in *Thompson v. The State*, 28 Ala. 12, 16.

could not, by repairing to Scotland, shake off the disabilities imposed upon them by the English law; and yet such marriages are held valid in England to all intents and purposes. The principle of allegiance here referred to applies to the immediate political relationship between the sovereign and the subject; and it seems to be a total misapprehension to suppose, that it interferes in any way with questions of purely municipal law, unconnected with that point. The doctrine of the indissolubility of marriage, so far as it exists in England, is unquestionably derived from the canons of the Roman Church.”¹

§ 198 [760]. But the discussions under this head are rather matter of curiosity than of practical utility to the American reader; since, whatever doubts may exist in England, the clear and settled doctrine in the United States holds the place of marriage to be altogether immaterial to the right of the courts to take jurisdiction over causes of divorce, or to the validity of the decree which dissolves the marriage.² *Lolley's case*, whatever it establishes for England,

¹ Hosack *Confl. Laws*, 265, note. See ante, § 131.

² *Dorsey v. Dorsey*, 7 Watts, 349; *Tolen v. Tolen*, 2 Blackf. 407; *Clark v. Clark*, 8 N. H. 21; *Barber v. Root*, 10 Mass. 260; *Hartean v. Hartean*, 14 Pick. 181; *White v. White*, 5 N. H. 476; *Harrison v. Harrison*, 19 Ala. 499; *Thompson v. The State*, 28 Ala. 12. It has, moreover, always been customary in this country to take jurisdiction in divorce suits without any reference to the country where the marriage was contracted; and this right has not been questioned. The following cases are illustrative: *Langstaff v. Langstaff*, Wright, 148; *Maguire v. Maguire*, 7 Dana, 181; *Healer v. Healer*, Wright, 210; *Hansel v. Hansel*, Wright, 212; *Guembell v. Guembell*, Wright, 226. There is, however, a South Carolina case, in which Dunkin, C., said: “In reference to a South Carolina marriage,” no divorces being allowed in South Carolina, Vol. I. § 42, it has been often repeated, although never formally decided, that the doctrine of *Lolley's case* is the law of this State. . . . The argument seems irresistible, that, in such cases, the *lex loci contractus*, the law of the place where the marriage is celebrated, furnishes the just rule for interpretation of its obligations and rights, as it does in the case of other contracts. It can only be dissolved by the law under which it was formed, and by which both parties understood it to be governed.” *Hull v. Hull*, 2 Strob. Eq. 174, 177, 178. And the same point has been since substantially adjudged in this State. *Duke v. Fulmer*, 5 Rich. Eq. 121. See also *Wells v. Thompson*, 13 Ala. 793. And see *Harman v. Harman*, 1 Cal. 215.

is of a date too recent (1812) to have the force of authority here. And but for what has been said about this Lolley's case, since it was decided, we should be unable to draw from the brief reports we have of it any such doctrine as it has been assumed to contain. Suppose the judges did utter the words attributed to them in this case, they were words not called out by the facts; the facts only showing a divorce without a domicile. And if all the foolish talk which has been made by wise judges while pronouncing their decisions, and transferred to the books of reports, were held to be law, our law would present a chaos wilder and more confounded than ever poet pictured, as having brooded over and dwelt in our earth, before God said, "Let there be light."

§ 199 [761]. Sixthly. *The doctrines thus laid down in this chapter are not controlled by the provision in the United States Constitution against laws passed by the States impairing the obligation of contracts.*¹ This proposition clearly results from viewing marriage, not as a contract, but as a status. And aside from this view, it was well observed by the late Chief Justice Marshall, that "this provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any State legislature," he adds, "shall pass an act annulling all marriage contracts, or allowing either party to annul them without the consent of the other, it will be time enough to inquire, whether such an act be constitutional." And in the same case from which these observations are taken, Judge Story says: "A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of

¹ See Vol. I. § 665.

breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligations of the contract, on both sides. A law punishing a breach of a contract by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract."¹ And this general view has received the sanction of other judicial authority. The more solid opinion appears to be, that marriage is not included at all in this constitutional provision.² This question, in another aspect, came under our review in the first volume.³

¹ *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, 695.

² *Tolen v. Tolen*, 2 Blackf. 407; *Maguire v. Maguire*, 7 Dana, 181; *Berthelemy v. Johnson*, 3 B. Monr. 90; Opinion of the S. J. Court of Maine, 16 Maine, 481; *Starr v. Pease*, 8 Conn. 541; *Jones v. Jones*, 2 Tenn. 2; *Bingham v. Miller*, 17 Ohio, 445, 447; *Levins v. Sleator*, 2 Greene, Iowa, 604; *Ngel v. Ewing*, 9 Ind. 37; and see *Leith v. Leith*, 39 N. H. 20.

³ Vol. I. § 665 et seq.

CHAPTER XII.

THE DIVORCE FROM BED AND BOARD AND THE DECREE FOR ALIMONY.

§ 200. THE doctrines considered in the last two chapters relate principally to the divorce from the bond of matrimony. We saw, indeed, that, under some circumstances in which a court is authorized, on general principles of jurisprudence, to take a jurisdiction to decree a divorce from the bond of matrimony, it has not the jurisdiction to go beyond this decree and grant alimony, or any thing in the nature of alimony, or make any order personally binding upon the opposite party who may be dwelling in another country.¹ Let us consider a few points connected with the general subject mentioned in the title of this chapter; requesting the reader, that, as regards the more full doctrine, he will consult the foregoing chapters in connection with this one.

§ 201 [762]. We have already seen,² that, while the English courts appear to entertain some views which to us would seem unsound concerning the indissolubility by a foreign sentence of an English marriage, they deem the divorce *a mensâ et thoro* to be grantable by themselves, wherever the marriage was celebrated. *A fortiori*, this is the American doctrine. On the point of the authority to take jurisdiction when the defendant is domiciled in a foreign country, and so the citation cannot be served on him personally, — though the authority exists in respect of divorces dissolving the marriage, probably the rule is otherwise where the divorce sought

¹ Ante, § 169, 170.

² Ante, § 180 and note.

is from bed and board. For in the first place, the latter divorce from an absent party would do the applicant no good, unless by way of suing on the decree in the foreign country, to recover the alimony ordered. In the foreign country also, the decree could have no operation, except as a foundation for such a suit, the whole effect of which suit is to collect money; and, if no jurisdiction of the defendant was had, sufficient to sustain a judgment in a suit on an ordinary contract, probably the foreign tribunals would refuse to give this judgment any effect whatever. And it is presumed this would be so even as between the States of this Union; notwithstanding the provision, in the United States Constitution, about the judgments of the courts of the States having a binding force in States other than those in which they were rendered.¹ For it is familiar doctrine, to the support of which it is not necessary here to cite authorities, that, in an ordinary personal suit against a party for the recovery of money and the like, if the defendant has no legal notice of the suit, such as is proper for domestic defendants to receive in such actions, and if he does not appear and contest the claim, the judgment, though it may be rendered under a law requiring its rendition, is not a judgment binding upon the defendant, either on general principles of international jurisprudence, or under the Constitution of the United States. In the next place, the divorce *a mensâ et thoro* appears properly to determine no question of status, the parties being married parties after the divorce the same as before; so the government has no sufficient interest in this suit, under these circumstances, to sustain it in opposition to general principles, as to jurisdiction between parties. Even the question of the legitimacy of the children, which is *prima facie* affected by a divorce of this kind, seems not to be important here; for the fact of the husband residing abroad would alone be practically the same in the courts, on this question, as a divorce from bed and board.²

¹ And see Vol. I. § 693; ante, § 169, 170.

² Vol. I. § 447-449, 546-549.

§ 202 [763]. But the suggestions of the last section are based principally on the mere reason of the thing; for adjudication has shed little light on the question. Yet suppose, in a case where both the parties reside in the same country, a divorce from bed and board is regularly pronounced, on due contestation, in the proper court of their domicile, the defendant appearing and answering to the suit, and afterward they remove to another State or country,—there is room for doubt, what precise effect even this divorce will have in the latter locality. And so in respect to the decree for alimony; especially upon such a divorce. If the tribunals of the new domicile can take notice of even any part of the foreign decree, as perhaps they can of the whole of it, in what form of proceeding is this to be done? Such an adjudication has, in the court where it was rendered, no more than a sort of interlocutory force,—But how, in, for example, one of the United States, under the provisions of the national Constitution, assuming them to apply to the case, is a decree for divorce from bed and board and alimony, rendered in a sister State, to be carried into effect? It seems to have been assumed, that it may be, in some way.¹ And in a late Alabama case, the doctrine was laid down, that a decree of alimony without divorce, pronounced in South Carolina, could be enforced in Alabama, for what was due, extending to the time a divorce was declared in Alabama; not beyond.² Likewise in Kentucky, where a husband had obtained in the courts a divorce *a vinculo* from his wife, and afterward both parties became citizens of Ohio, and the Ohio tribunal had given her, in a suit which the man defended, a portion of his estate under the name of alimony, it was held, that the Kentucky courts could enforce this decree.³ But this decree, the reader perceives, is a thing quite different from a decree of alimony proper. On the other hand, the Wisconsin court decided, that an action of debt will not lie upon a decree of divorce from bed and board and for alimony, duly entered

¹ Borden v. Fitch, 15 Johns. 121.

² Harrison v. Harrison, 20 Ala. 629.

³ Rogers v. Rogers, 15 B. Monr. 364.

up in another State; and the court proceeded further to announce the general doctrine, that the tribunal rendering the decree could alone, in its own jurisdiction, compel its performance; it not being enforceable in a sister State.¹ Whether the courts of the new domicile can entertain an original suit for separation, founded on the foreign decree, is a question not yet judicially discussed. In a recent Scotch case it was held, and confirmed on appeal by the House of Lords, that a divorce from bed and board in England, obtained by the wife for the husband's adultery, was no bar to her proceeding in Scotland for a divorce from the bond of matrimony on account of the same adultery.²

§ 203. In the Supreme Court of the United States it was by a majority of the court held, that, when a court of competent jurisdiction in one of the States decrees a divorce *a mensâ et thoro* between husband and wife, and then the husband removes to another State, she remaining behind, the United States tribunal,—the parties becoming thus citizens of different States,—will take jurisdiction to hear her complaint for the enforcement of the payment against the husband, of the alimony. The proceeding, which was sanctioned, was by bill in equity. Said Wayne, J.: "The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the Ecclesiastical Court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has

¹ Barber v. Barber, 1 Chand. 280. And see Morton v. Morton, 4 Cush. 518; Clark v. Clark, 6 Watts & S. 85.

² Geils v. Dickenson, 20 Eng. L. & Eq. 1, 15 Scotch Sess. Cas. n. s. H. of L. 28; s. c. in House of Lords, Geils v. Geils, 1 Macq. Scotch Ap. Cas. 255.

in the State in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the States have jurisdiction."¹ But the question of the effect of the sentence, where the jurisdiction is admitted, is a matter which will come up for discussion in another connection.

§ 204. Where the question of the custody of a child was adjudicated in Maryland on a suit for divorce brought by the husband against the wife, wherein the husband's prayer for a divorce was allowed, and the custody was given to the husband, — and afterward, the husband being temporarily with the child in Massachusetts, the wife attempted by a *habeas corpus* to obtain its custody, — "Upon this state of facts," says the report, "the respondent contended, that, as by a decree of the court in Maryland, where he had his legal domicil, and which was therefore the legal domicil of the wife, the custody of the child had been given to him, this court could not obtain jurisdiction of the case simply by his being here with the child temporarily, on a visit which might be determined at any moment. The court held, however, that a decree of any tribunal as to the custody of a child was never final; but that the same tribunal or any other where the child was either temporarily or permanently staying, might consider the question upon the facts then existing, and, looking at the welfare of the child, determine whether any and what change should be made in regard to its custody."² This was a case before a single judge of the Supreme Judicial Court of Massachusetts, yet there is reason to believe that the conclusion is the same to which the whole court would have arrived; and it is difficult to deny, that it should be accepted as just. Yet doubtless, under most circumstances, the foreign decree would be considered as entitled, on such a hearing, to considerable weight.

¹ Barber v. Barber, 21 How, U. S. 582, 591.

² Thorndike v. Rics, 24 Law Reporter, 19, 20.

§ 205. It seems to have been assumed in England, that, though the Scotch courts cannot dissolve the bonds of an English marriage in cases where the parties are not domiciled in Scotland, they may perhaps render a valid and binding sentence of divorce from bed and board.¹ This proposition, if it is to be accepted as correct in its application to this country, does not carry the doctrine so far as to give the jurisdiction where, there still being no domicile, the court obtains no jurisdiction over either the person or the property of the defendant. There may be reasons why a court should take jurisdiction to compel a husband to alimment his wife, though neither husband nor wife is domiciled in the country, where the two are in the country for a temporary sojourn. The wife should not be left to starve, or to suffer with hunger for a day, out of respect for the fact that the husband has a foreign domicile.

§ 206. At the same time it must be observed, that, upon general principles of jurisprudence, should a tribunal undertake to sentence to a separation from bed and board parties domiciled abroad, the courts of their domicile could give but limited, if any, effect to the sentence.² Yet this is a matter respecting which judicial decision seems not to help us; so let us pass on.

§ 207. The locality in which the suit to declare a marriage void from the beginning is to be instituted, has not been much discussed in the United States or in England; but it seems to have been assumed, and it has been assumed by the writer in the foregoing chapters, that this suit is to be carried on in the same locality as is the suit to dissolve the bond of a valid marriage. There can be little doubt that this view is correct, and a few of the cases referred to in the earlier chapters of this our present division of our subject have been cases of this sort.

¹ *Dolphin v. Robins*, 7 H. L. Cas. 390, 414.

² And see ante, § 201.

CHAPTER XIII.

THE JURISDICTION UNDER PARTICULAR STATUTES.

§ 208. IN the course of the foregoing discussions there have been developed various legal doctrines which might properly find a place in the present chapter. Thus, the statutes of a State are to be interpreted in harmony with the general principles which govern this department of our jurisprudence; and, where their words will properly admit of it, they are to be understood to give the court jurisdiction when, and only when, a jurisdiction might be assumed according to the principles of general law, as developed in the foregoing chapters.¹ But there are statutes in some States which by express words or necessary implication require a departure from these principles.²

§ 209 [765]. In the foregoing discussions also, we considered what was the proper interpretation of a few specific statutes.³ What will be attempted here will be to carry out this work a little further. Where a statute made it necessary for the plaintiff to be an inhabitant of the State at the time of bringing his bill for divorce, the residence mentioned was construed to be a *bona fide* one, not a residence temporarily taken for the purpose merely of carrying on the proceedings.⁴

§ 210 [765]. But where the statute provided, that "no person shall be entitled to a divorce from the bond of matri-

¹ Ante, § 114; Vol. I. § 90.

² Ante, § 154.

³ Ante, § 114, 154, 158, 162, 173, 177, 199.

⁴ *Williamson v. Parisien*, 1 Johns. Ch. 389; *Smith v. Smith*, 4 Greene, Iowa 266. And see *Lyon v. Lyon*, 2 Gray, 367; ante, § 122.

mony, by virtue of this act, who is not a citizen of this State, and who has not resided therein at least one whole year previous to filing his or her petition ;” and the parties were citizens, yet the plaintiff wife, at the time of instituting her suit and for a period before, had a temporary residence abroad, with the intention of returning, — the jurisdiction was sustained. Said the judge: “Do the latter words intend, that the residence shall be immediately before filing the petition? We are of opinion that they do not. When the citizenship is once established, the court will not consider, where there is no intention of abandonment, that mere absence from the State shall be such abandonment. . . . She has resided in the State one whole year before filing the petition, and against a citizen we will not necessarily make that year next before filing the complaint.”¹

§ 211 [765]. And in an Iowa case, the statute of which State requires the petition for divorce to state, that the petitioner “has been for the last six months a resident of the State,” the court held, that merely abiding personally in the State during the six months is not sufficient; the residence must be intended by the petitioner to be a permanent one, *animo manendi*, in distinction from a transient sojourn.² Probably such statute should be interpreted to require a domicil, and only a domicil, as the matter was explained in a previous chapter.³

§ 212 [766]. The Connecticut statute provides, that, “if the petitioner shall have removed from any other State or nation to this State, and shall not have steadily resided in this State three years next before the date of the petition, he

¹ Fickle v. Fickle, 5 Yerg. 203. And see ante, § 127. See Person v. Person, 6 Humph. 148, in respect to the subsequent Tennessee Statute of 1835. And see McDermott's Appeal, 8 Watts & S. 251.

² Hinds v. Hinds, 1 Iowa, 36, 49. See also Kruse v. Kruse, 25 Misso. 68; Schonwald v. Schonwald, 2 Jones Eq. 367; Ashbaugh v. Ashbaugh, 17 Ill. 476.

³ Ante § 116 et seq.

or she shall take nothing by the petition, *unless the cause of divorce shall have arisen subsequent to his or her removal to this State.*" And it was held on a proceeding for divorce for intolerable cruelty and intemperance, that, though the intemperance, which was a sufficient cause of itself, had continued after the removal of the wife into the State; still, as the husband had not come with her, but was a citizen of another State, she could not maintain her petition, until she had remained the three years; the exception in the statute applying only to cases where both parties have become residents of Connecticut, within whose jurisdiction the offence is subsequently committed. Said the judge: "The legislature surely could never have intended, that a woman living with her husband in another State might come into this State, and, by showing that her husband has been habitually intemperate or committed adultery since she removed to this State, at once obtain a divorce. Such a construction would open a wide door for applicants from abroad."¹ This interpretation is certainly very strict.²

§ 213 [766 a]. In Rhode Island, the general provision of the statute forbidding divorce to plaintiffs who have not resided a specified time in the State, may be, under a statute also, dispensed with by the court in its discretion. Some principles to guide this discretion have been laid down by the tribunal; as, for instance, in a late case, Staples, C. J., said: The jurisdiction has been taken without the specified residence "in case the causes of divorce occurred in this State, or were causes of divorce under the laws of the State where they occurred," if also both parties were domiciled in Rhode Island. Under other circumstances the jurisdiction had been declined, when sought on a residence less than the usual time.³

¹ *Sawtell v. Sawtell*, 17 Conn. 284. See also *Brett v. Brett*, 5 Met. 233, a decision which has become unimportant in Massachusetts, in consequence of Stat. 1843, c. 77.

² And see *Hopkins v. Hopkins*, 35 N. H. 474; *Goodwin v. Goodwin*, 45 Maine, 377.

³ *Williams v. Williams*, 3 R. I. 185. And see *Ditson v. Ditson*, 4 R. I. 87.

§ 214. A statute in Massachusetts provides, that, "when an inhabitant of this State goes into another State or country to obtain a divorce for any cause occurring here, and whilst the parties resided here, or for any cause which would not authorize a divorce by the laws of this State, a divorce so obtained shall be of no force or effect in this State."¹ Therefore a divorce obtained in contravention of the statute cannot be set up in defence of a libel which the other party to the marriage may bring for a divorce against the party so obtaining the void foreign divorce. And in a case of this general complexion it was observed by Shaw, C. J.: "The presumption is violent, if not conclusive, that the husband went into Indiana in order to obtain a divorce. Even if he had other objects in view, if this was one—and his acting upon it is strong proof that it was—it would be within the statute."² If the decree of the Indiana or other foreign court sets forth, that the applicant for divorce was a citizen of such State, this will not avail in Massachusetts to estop inquiry into the real fact. And if the applicant, before he went to Indiana, endeavored to obtain in Massachusetts a divorce from his wife and failed, this fact may be received in evidence as tending to show, that the removal to Indiana was not *bona fide*, but had for its object, or one of its objects, the obtaining of a divorce there.³ Some other points will be considered in connection with specific titles further on in this volume.

¹ Gen. Stats. c. 107, § 54.

² Smith v. Smith, 13 Gray, 209.

³ Shannon v. Shannon, 4 Allen, 134.

BOOK III..

THE GENERAL PRINCIPLES OF THE PROCEDURE, EM- BRACING PLEADING, PRACTICE, AND EVIDENCE.

CHAPTER XIV.

THE PRACTICE OF THE ENGLISH ECCLESIASTICAL COURTS.

§ 215. WE have already seen,¹ that, in England, at the time when we received thence our common law, divorce causes were heard in the Ecclesiastical Courts; and that, therefore, if we have inherited any practice as pertaining particularly to this class of suits, it is the practice of those courts. In our first volume, there was a discussion of the general question concerning the extent to which the ecclesiastical practice is binding upon our tribunals in divorce cases; and to that discussion reference is here made, as rendering it unnecessary to enter into the matter here.² What will be attempted in the present chapter is, to furnish the reader with such an outline of the ecclesiastical practice as shall make palpable to him the relevancy of those discussions which, in subsequent chapters, will be drawn out from, or based upon, this practice; and shall likewise enable him more fully to appreciate, than otherwise he could, those expositions of legal doctrine which, in the reports of English divorce cases, are enwoven

¹ Vol. I. § 64 and accompanying sections.

² Vol. I. § 78-86.

with allusions to the course of procedure in the ecclesiastical tribunals.

§ 216. There are two kinds of proceeding known in these courts, and designated as the *plenary* and the *summary*. A divorce suit is always carried on in the plenary way; but there are collateral matters connected with such a suit, and these are taken up summarily. The first pleading in a divorce cause is termed the *libel*; but the pleading which corresponds to the libel, is, in a summary proceeding, termed the *act on petition*; though the phrase act on petition is also employed to denote the proceeding which is instituted in this way. In a plenary cause, all the pleadings, whether of the promotor or the respondent, subsequent to the libel, are denominated *allegations*; and in some other kinds of suits,—that is, suits not matrimonial,—the first pleading even, instead of being termed a libel, is, like each subsequent pleading, called an allegation. But the word *plea*, though less technical than the word allegation, is quite often used, in the opinions of the courts, to denote the same thing.

§ 217. An *answer* is not an allegation; it is not a plea; it does not belong, in any way, to the pleadings. It—that is, the personal answer, which is the common case—is the response which the party, whether promotor or respondent, makes, under oath, to the allegation (here using the word allegation to denote as well the libel as the subsequent pleadings) of the opposite party. It is quite important to remember the meaning of the term answer; as otherwise the reader, who is familiar with equity proceedings, might be led into misapprehension.¹

§ 218. It is said by Mr. Law, whose work is mainly a translation of the first part of Oughton, that each of the parties is entitled to put in three successive allegations, but no more,—“each supporting and strengthening the preceding.”

¹ And see, on this matter, *Morgan v. Hopkins*, 2 Phillim. 582; post, § 281.

And he adds: "The promovant, having received light from the pleading of the impugnant, amends his bill, to use a phrase familiar to the equity lawyer, that is, he files a second allegation (for this part of the proceeding may be more justly compared to those in the equity courts than in those of law), and in the same manner he may file a third; but he can go no further." In like manner, "the defendant or impugnant has also a right to put in three defensive pleadings."¹

§ 219. There seems to be some confusion in such of the English books as the writer has consulted, as to the exact meaning of the term *contestation*, and the practice of the courts relating thereto. Yet it seems to be a sort of joinder in issue, but not exactly that, since it takes place before the full issue, in the common law sense, is made up. "Contestation of suit is the foundation and corner-stone of every plenary ecclesiastical cause, without which all the proceedings are null." "Contestation immediately causes the proctors on both sides to become lords of the controversy, or masters of the suit." "Contestation of a suit cannot take place unless the plaintiff, or his proctor, is present in court." "The plaintiff, or rather the proctor of the plaintiff, on the day assigned for the defendant's answer to the libel, should say, in presence of the said defendant or his proctor, 'I pray an answer to the libel, according to the terms of your assignation.' Then the defendant, if he does not wish to contest suit negatively, should confess the libel, by answering affirmatively, and submitting to the judge, and tendering payment of the taxed costs. If, however, the defendant intends to contest suit negatively, he must make the following declaration: 'Protesting against the libel, for its too great generality, inapplicability, obscurity, nullity, and erroneous representations, I answer, that the statements, as contained in the said libel, are not true, and therefore that the prayer of the said libel should not be granted. And therefore I contest

¹ Law's Forms, 179, 180.

suit negatively.’”¹ It is not necessary to copy more from the books on this point; but the reader will be interested to look into the work whence these extracts are taken, and read on from the place where they leave off. Undoubtedly the modern usages of the Ecclesiastical Courts have more or less changed the actual course of things, as relates to this matter.

§ 220. When a libel or any other allegation has been presented, it is open to the other party to object to its admission; the objection is a sort of demurrer (to use a word familiar in common law and equity proceedings) to the allegation. The court may either reject the allegation altogether, or order it to be reformed; or, of course, on the other hand, admit it.

§ 221. At a proper time after an allegation is admitted, the personal answer of the opposite party having been taken, and “a term *probatory*, or period of proof,” having been assigned by the court, within which period the party “is bound to procure all his evidence, unless cause can be satisfactorily shown for renewing the term,” — “the proctor whose plea is to be substantiated, produces his witnesses, in succession, before a surrogate, who administers the customary oath to each witness, and monishes him to attend to undergo his examination whenever he shall be required for such purpose. This is done in the presence of the other proctor.”² The testimony is taken in private before an officer of the court called, an *examiner*, and by him reduced to writing. The court has several of these officers, but they are sworn, and the party selects the one he chooses. The mode of taking the testimony is for the examiner to have before him the allegation (be it the libel or a subsequent allegation) to substantiate which the witness is produced, and to put orally to the witness such questions as he deems adapted to draw out the truth, respecting each matter alleged, then to write down what the witness says. The party who thus produces the

¹ Law's Forms, 173-175.

² Coote Ec. Pract. 779.

witness to substantiate the allegation, does not also present written interrogatories; but the articles of the allegation used by the examiner as just explained, stand in the stead of interrogatories. The other party, however, prepares, if he chooses, written interrogatories, which are put by the examiner to the witness.

§ 222. It would appear that each allegation (reckoning the libel as one of the allegations), on the one side and on the other, has its term probatory, and its course of proofs generally, the same as though it alone constituted the whole case. It is not necessary, therefore, in these courts, that the pleadings shall be finished, before testimony on the earlier pleadings is taken.

§ 223. Besides the regular allegations in contestation of the main matter, there may be ancillary allegations; as, for example, in a divorce suit, the *allegation of faculties*, wherein the faculties, or property and income, of the husband, are set out. There may be also, as before explained, the *act on petition*, and the proceedings consequent upon it. But it is deemed that these sections will suffice to give the reader a general idea of the course of a cause in these courts, and the meaning of the leading terms employed. Where any thing more of explanation is required, it will be found in its appropriate place in subsequent chapters. This sketch is not made to assist practitioners in those courts, but to enlighten American readers, and practitioners in other tribunals. It is believed to be substantially accurate as an outline; the filling up of which, together with a full collection of the authorities bearing on the several points, would occupy too much of our space.

CHAPTER XV.

A GENERAL VIEW OF THE DIVORCE SUIT.

- SECT. 224. Introduction.
225-229. The different Kinds of Divorce explained.
230-251. The Rule of consulting the Public Interest.
252, 258. The Issues in the Divorce Suit.
254-261. The Course of Procedure in Outline.
262-276. The Evidence of Marriage in this Suit.
277-288. Proofs and Witnesses.

§ 224. It is proposed, in this chapter, not only to give an outline of the proceeding whereby a divorce is obtained, but to fill up also the outline, except as respects several specific things which will severally furnish subjects for successive chapters to be inserted further on. The matter of this chapter will be divided as follows: I. The different Kinds of Divorce explained; II. The Rule of consulting the Public Interest; III. The Issues in the Divorce Suit; IV. The Course of Procedure, in Outline, whereby the Issues are evolved and tried; V. The Evidence of Marriage in this Suit; VI. Proofs and Witnesses.

I. *The different Kinds of Divorce explained.*

§ 225 [292]. Divorce is the dissolution or partial suspension, by law, of the marriage relation; the dissolution being termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii*; the suspension, divorce from bed and board, *a mensâ et thoro*. The former divorce puts an end to the marriage; the latter, leaves it in
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full force.¹ The term divorce is sometimes also applied to a sentence of nullity, which declares the marriage to have been void from the beginning.² The propriety of so applying it, where the marriage is void, is perhaps questionable; but properly it designates the annulling of a voidable marriage; the reason of the distinction being, that the latter has a legal existence until sentence passed, while the former has not. We therefore speak of impotence as a ground of *divorce*; and Blackstone says, the divorce *a vinculo matrimonii* must be for some of the canonical causes or impediments.³ But with equal propriety we use the expression, sentence, or decree, of nullity to designate the legal avoiding of a voidable marriage; and it seems more significant and less liable to be misunderstood than the other, and somewhat better to accord with modern usage.⁴ So a divorce *a mensâ et thoro* is sometimes called a separation,⁵ and the proceeding to obtain it, a suit for separation; leaving the term divorce to be applied only to the dissolution of the marriage for causes which arose subsequently to its celebration. In England, a change of terms has been effected by Stat. 20 & 21 Vict. c. 85, § 7, which provides, that "no decree shall hereafter be made for a divorce *a mensâ et thoro*; but, in all cases in which a decree for a divorce *a mensâ et thoro* might now be pronounced, the court may pronounce a decree for a Judicial Separation, which shall have the same force and the same consequences as a divorce *a mensâ et thoro* now has."

¹ Clark v. Clark, 6 Watts & S. 85; 2 Burn Ec. Law, Phillim. ed. 501 l.

² And see Vol. I. § 137.

³ 1 Bl. Com. 440. It is said, however, that "the civil and canonical disabilities, which render the marriage contract either void or voidable, are grounds of separation for nullity of marriage, but *not*, correctly speaking, for a *divorce*." Shelford Mar. & Div. 365; Godol. Ab. 500.

⁴ See Rogers Ec. Law, art. Divorce; Wadd. Dig. ib.; Shelford Mar. & Div. 182, 365; 1 Fras. Dom. Rel. 709.

⁵ See the New York Reports generally. This is also the modern Scotch term; and the phrase "divorce *a mensâ et thoro*" has entirely fallen into disuse in Scotland. 1 Fras. Dom. Rel. 645, note.

§ 226 [293]. These divorces and separations, though granted sometimes by legislative action, as was shown in the first volume,¹ are usually in this country, and indeed everywhere, matter of judicial investigation and sentence. As such, we are now considering them.

§ 227 [294]. In some of our States, the divorce for certain of the causes may be either from bed and board, or from the bond of matrimony, at the election of the party applying for it.² In one or two other States, the former species of divorce is in some circumstances preliminary to the latter.³ In North Carolina, the divorce for certain of the causes is to be either from bed and board, or from the bond of matrimony, at the discretion of the court.⁴ So also in Tennessee,⁵ and in California.⁶ This discretion is construed to be, not an arbitrary, but a sound and judicial one, founded on some reasonable and fixed principles. In one case it was intimated, as the rule of distinction, that, "although a divorce *a mensâ et thoro* may be allowed in some instances to a person who is not entirely impeccable, who may not have been exemplary in all the attentions and stipulated offices assumed in contracting this relation, yet the policy of the law, the interest of the offspring, the tranquillity and happiness of families, in general, forbid the dissolution of marriage at the suit of a person to whom default in any of the essential duties of married life can be fairly imputed;"⁷ and a like doctrine was laid down in California.⁸ Generally in the United States the statute determines, whether the divorce shall be from bed and board, or from the bond of matrimony.

¹ Vol. I. § 660 et seq.

² *Smith v. Smith*, 3 S. & R. 248; *Light v. Light*, 1 Watts, 263; *Coverdill v. Coverdill*, 3 Harring. Del. 13; *Ledoux v. Her Husband*, 10 La. An. 663.

³ *Savoie v. Ignogoso*, 7 La. 281; *Ledoux v. Her Husband*, supra.

⁴ *Collier v. Collier*, 1 Dev. Eq. 352; *Whittington v. Whittington*, 2 Dev. & Bat. 64; *Moss v. Moss*, 2 Ire. 55.

⁵ *Rutledge v. Rutledge*, 5 Sneed, 554.

⁶ *Conant v. Conant*, 10 Cal. 249.

⁷ *Whittington v. Whittington*, supra; s. p. *Moss v. Moss*, supra. See also *Rutledge v. Rutledge*, 5 Sneed, 554; *Buckholts v. Buckholts*, 24 Ga. 238.

⁸ *Conant v. Conant*, supra, 257, 258.

§ 228 [295]. In the ecclesiastical law, the divorce from bed and board may, it is said, be either for a time or without limitation of time;¹ but, however this may be, the established form of sentence separates the parties "until they shall be reconciled to each other."² Occasionally in the United States, a statute has expressly authorized the courts to make the separation perpetual, or for a limited period, in their discretion. Chancellor Kent, construing such a statute in New York, decided, on a review of the general policy and reason of the law, that, as a general rule, the decree should be for a perpetual separation, with a proviso allowing the parties at any time thereafter, by their mutually free and voluntary act, to apply for leave to be discharged from the decree.³ But we shall discuss the effect of a sentence of separation in subsequent pages; and we shall there see, that a reconciliation, though out of court, does *de facto* put an end to this species of divorce.

§ 229 [296]. Though divorces from bed and board and from the bond of matrimony are different in their effects, the legal principles governing the proceeding, down to the time of pronouncing the decree or sentence of divorce, are usually the same: so we may conveniently discuss them together, till we come to the point of divergence. The suit for nullity, also, is substantially included in this proposition; though some special observations in relation to it, will occur in our next chapter.

II. *The Rule of consulting the Public Interest.*

§ 230 [297]. It has been sufficiently shown, in the foregoing pages, that, not only the parties, but the public also,

¹ 2 Burn Ec. Law, Phillim. ed. 5011; Ayl. Parer. 225; *Barrere v. Barrere*, 4 Johns. Ch. 187.

² *Poynter Mar. & Div.* 182, note; *Coote Ec. Pract.* 347; *Conast*, 279; *Oughton*, tit. 215.

³ *Barrere v. Barrere*, 4 Johns. Ch. 187. See *Bedell v. Bedell*, 1 Johns. Ch. 604;

have an interest in marriage and in its dissolution. Growing out of this twofold interest, we have the doctrine, running through all matrimonial suits, and bringing into subserviency all other law on the subject, that the proceeding, though upon its face a controversy between the parties of record only, is, in fact, a triangular suit, *sui generis*, the government, or public, occupying the position of a third party,¹ without counsel, it being the duty of the court to protect its interests. Indeed the States of Kentucky² and Indiana³ do, or at some period did, provide counsel for this third party; since a statute there has made it the duty of the public prosecuting officer to oppose all suits for divorce. So in Scotland, the procurator-fiscal used to look after the interests of the public in every divorce cause, though both of the parties are likewise represented by counsel.⁴ Now by the recent statute of 24 and 25 Vict. c. 86, § 8, it is provided for Scotland, that "it shall be competent to the Lord Advocate to enter appearance as a party in any action of declarator of nullity of marriage or of divorce; and it shall be competent to him to lead such proof and maintain such pleas as he may consider warranted by the circumstances of the case; and the court shall, whenever they consider it necessary for the proper disposal of any action of declarator of nullity of marriage or of divorce, direct that it be laid before the Lord Advocate, in order that he may determine whether he should enter appearance therein; and expenses shall not be

Clutch v. Clutch, Saxton, 474 (the New Jersey statute authorizing either form); Graecen v. Graecen, 1 Green Ch. 459; Coles v. Coles, 2 Md. Ch. 341.

¹ Whittington v. Whittington, 2 Dev. & Bat. 64. And see Berthelemy v. Johnson, 3 B. Monr. 90; Opinion of the Supreme Judicial Court, 16 Maine, 481. "In this State," says the editor of McCord's South Carolina Statutes at Large, vol. 3, p. 733, "marriage is a civil contract, of mutual partnership and personal cohabitation during life, under the provisions of laws passed on this subject. The parties are the man, the woman, and the State. The State is interested, her interest being that the contract shall be fulfilled beneficially to the progeny, of whom the future citizens are to be composed." For other definitions of marriages, see Vol. I, § 3 et seq.

² Stat. of Jan. 31, 1809, § 5. 1 Morehead & Brown's Dig. 123.

³ Revised Statutes of 1843, c. 35, § 69; Green v. Green, 7 Ind. 113.

⁴ Ferg. 363, 373, 3 Eng. Ec. 482, 488; Tovey v. Lindsay, 1 Dow, 117, 134, 139.

claimable by or against the Lord Advocate with reference to such cases." It appears to the writer, that this provision is a simple and useful one, and not unworthy to be adopted in our own country. We have already seen,¹ that, in England, the Queen's Proctor may in some circumstances intervene.

§ 231 [297]. The reason of this peculiarity, we have just said, is, that society, or the public, or the government, as we may choose to express it, has, in fact, an interest in every marriage.² So are the children, born or *en ventre sa mere*, peculiarly interested in the marriage; and, as they cannot protect themselves, the government, represented for this purpose by the judge, is bound to protect them. Particularly is this so in suits for nullity, which have the effect, when successful, to make or declare, as the case may be, the children illegitimate.³ Establishing, therefore, the justice of an application for divorce, not merely as between the parties of record, but as between them and the community, including those individuals who are specially interested yet not before the court, is what is frequently termed, in these cases, satisfying the conscience of the court.

§ 232 [298]. These considerations will assist us in answering the question, frequently discussed, whether the suit for divorce is a civil or a criminal proceeding. In England, the suit for divorce *a mensâ et thoro* was always civil in form;⁴ but the ecclesiastical courts would pronounce a sentence

¹ Ante, § 32.

² Vol. I, § 34; Campbell's case, 2 Bland, 209, 235; Gould v. Gould, 2 Aikens, 180. "Marriage," says Lord Stowell, "is a contract formed with a view, not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society. There are undoubtedly cases for which a separation is provided; but it is lawfully decreed by public authority, and for reasons which the public wisdom approves." Evans v. Evans, 1 Hag. Con. 35, 4 Eng. Ec. 310, 349. See also McCord's South Carolina Statutes at Large, Vol. 2, p. 733 *ut supra*.

³ Wright v. Elwood, 1 Curt. Ec. 662, 666. And see Cross v. Cross, 3 Paige, 139; post, § 294.

⁴ Ayl. Parer. 44.

of nullity, not only when applied to in the civil suit for that purpose, but likewise in the criminal prosecution, as for incest.¹ In the latter proceeding, it was not essential, but customary, to specify the matter of nullity in the citation.²

§ 233 [299]. In the United States, suits for divorce, nullity, and separation, are always in the civil form. Still a learned judge has said, that "regulations on the subject of marriage and divorce are rather parts of the criminal than of the civil code; and apply, not so much to the contract between the individuals, as to the personal relations resulting from it, to the relative duties of the parties, and to their standing and conduct in the society of which they are members; and these are regulated with a principal view to the public order and economy, the promotion of good morals, and the happiness of the community."³ On the other hand it has been contended, that this remedy is purely a civil one; and a high authority has well observed, that a divorce suit is a private prosecution, under the control of the party aggrieved, who may avail himself of it, or bar himself by his own act.⁴

§ 234 [300]. Now it is clear, that a suit for divorce, even where alimony is sought, is not an action upon the contract of marriage. It is rather an action sounding in tort, for the redress of a private wrong.⁵ Sometimes it is followed by a consequence partly penal; as where the guilty one is prohib-

¹ *Burgess v. Burgess*, 1 Hag. Con. 384; Vol. I. § 110; *Shelford Mar. & Div.* 175-184.

² *Chick v. Ramsdale*, 1 Curt. Ec. 34; *Blackmore v. Brider*, 2 Phillim. 359; *Cleaver v. Woodbridge*, cited *Ib.* 362.

³ *Sewall, J.*, in *Barber v. Root*, 10 Mass. 260, 265; *Dorsey v. Dorsey*, 7 Watts, 349; *Garrat v. Garrat*, 4 Yeates, 244; *Dickinson v. Dickinson*, 3 Murph. 327. And see *O'Bryan v. O'Bryan*, 13 Misso. 16, 21.

⁴ *Chancellor Kent*, 2 Kent. Com. 100; *Clark v. Clark*, 10 N. H. 380, 389; *Humphrey v. Humphrey*, 7 Conn. 116; *Delliber v. Delliber*, 9 Conn. 233; *Westbrook v. Westbrook*, 2 Greene, Iowa, 598; *Herron v. Herron*, 16 Ind. 129; *Gilbert v. Thomas*, 3 Kelly, 575.

⁵ See Vol. I, § 15.

ited by law from entering into a second marriage, during the life of the innocent one ;¹ but this does not necessarily make the proceeding criminal.² Nor has any person ever supposed, that a sentence of divorce for adultery would bar an indictment for the same adultery, in States where this offence is punishable criminally, as perhaps it must be held to do if the divorce suit is strictly criminal. Neither is it any defence to a proceeding for divorce, that the facts charged are punishable as crime.³ We may therefore regard the divorce suit as a civil one, between three distinct parties,—the government, the plaintiff of record, the defendant of record. What the government does, is, first, to protect the rights of persons not before the court, but liable to be affected by the decree or sentence ; secondly, to guard the interest of the public as to its morals ; and, thirdly and chiefly, to see that the status of its subjects, who are the parties of record, and sometimes their children, is properly determined or established. But the government has no interest, which it desires to enforce, to compel the plaintiff of record either to bring the suit, or to prosecute it when brought ; wherefore the plaintiff may discontinue it, or bar his right, at pleasure.⁴ It is a civil, triangular action of tort, in its whole character *sui generis*.⁵

¹ *Dickson v. Dickson*, 1 Yerg. 110 ; Vol. I, § 304 et seq.

² *Clark v. Clark*, 10 N. H. 380, 390 ; *Woart v. Winnick*, 3 N. H. 473, 481.

³ *Nash v. Nash*, 1 Hag. Con. 140, 4 Eng. Ec. 357.

⁴ A party however cannot bar his own right in a way to conflict with public policy. Therefore, as separations by mutual agreement are against public policy, such a separation cannot cut off the privilege of either party to maintain, in England, a suit for the restitution of conjugal rights ; even though the articles of separation contain an express covenant not to institute this proceeding. *Westmeath v. Westmeath*, 2 Hag. Ec. Supp. 1, 115, 4 Eng. Ec. 238, 291 ; *Mortimer v. Mortimer*, 2 Hag. Con. 310, 4 Eng. Ec. 543, 547.

⁵ Mr. Fraser, after reviewing various opinions upon the question, whether the suit for divorce is civil or criminal, says : " The proper view to take of the objections to the right of divorce seems to have been held to be, to regard them not as arising from the will or consent of the parties, but as forming part of the public law of the country, established for the general good of the community ; and, therefore, not subject to the compacts, express or implied, which are entered into by individuals." 1 *Fras. Dom. Rel.* 665. And see *Ferg. note (F)*, p. 381, 3 Eng. Ec. 493 ; *Ferg. p.* 305, 306, 317, 3 Eng. Ec. 448, 455 ; Lord Brougham, in *War-*

§ 235 [301]. From these principles it follows, that no decree of nullity, or of divorce from bed and board, or from the bond of matrimony, can be entered by the court upon the mere consent or agreement of the parties of record; because they cannot bind the public. There must be a complaint in due form, for a cause authorized by law, supported by due proof. A default does not, as in other suits, supersede the necessity of proof, or lighten the burden of the plaintiff in establishing his allegations.¹ The court will not even sustain an agreement concerning the incidental matter of alimony, made by the parties in the course of the proceedings, until it is found, on inquiry, to be fair and equitable.² Yet in respect to all those questions in which the public has no interest, arising in the course of a divorce suit, the parties may conduct their cause as they would any other. Thus, they may, by agreement, discontinue the suit.³ And where the wife is authorized by statute to maintain the suit in her own name as a *feme sole*, she can compromise or settle it, even against the objection of her solicitor who has not received his fees. But the court will look into such a case so far as to see, that she has not been overreached or imposed upon by her husband.⁴

§ 236 [302]. Still, though a defendant of record cannot by his act bind the public, yet his default, acknowledgment,

render *v. Warrender*, 2 Cl. & F. 488, 537; Lord Stowell, in *Evans v. Evans*, 1 Hag. Con. 35, note, 4 Eng. Ec. 310, 338.

¹ *Palmer v. Palmer*, 1 Paige, 276; *Van Veghten v. Van Veghten*, 4 Johns. Ch. 501; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Graves v. Graves*, 2 Paige, 62; *Barry v. Barry*, Hopkins, 118; *Mansfield v. Mansfield*, Wright, 284; *Smith v. Smith*, Wright, 643; *Hanks v. Hanks*, 3 Edw. Ch. 469; *Robinson v. Robinson*, 1 Barb. 27; *Welch v. Welch*, 16 Ark. 527.

² *Daggett v. Daggett*, 5 Paige, 509. And see *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Threewits v. Threewits*, 4 Des. 560; *Hooper v. Hooper*, 1 Swab. & T. 602.

³ Ante, § 234.

⁴ *Kirby v. Kirby*, 1 Paige, 565. Under the present law of New York, the issue joined in a divorce suit may, by agreement of the parties and order of the court, be referred to a referee. Anonymous, 5 How. N. Y. Pract. 306. An agreement by counsel to compromise not recognized, *Hayward v. Hayward*, 1 Swab. & T. 333.

or consent for judgment, does settle the cause as against him, so that he cannot complain of any disposition the court may lawfully make of it afterward. As between him and the plaintiff, the charges are to be taken as true. Thus the defendant will not be entitled to costs, on the dismissal of the suit under such circumstances. Neither, being the wife, can she have alimony *pendente lite*. Yet it was held, that, after a bill — the proceeding being in equity — was taken for confessed, and referred to a master for proofs, the defendant wife might appear before the master, and cross-examine the plaintiff's witnesses and produce witnesses of her own, at her own expense, not otherwise.¹ The principle probably is, that the court, in satisfying its conscience, and protecting the rights of the public, will receive light from any source, only not to the undue burdening of the plaintiff.

§ 237 [303]. Obviously, also, the public cannot be interested to interpose technical objections; and, being always present in court by the judge, it cannot be taken by surprise for want of notice. Therefore all questions preliminary to the hearing, such as relate to the service of process when the defendant has actual notice and appears, waiver of service, amendments,² and other matters of this sort, may be governed, as in other cases, by ordinary judicial rules, calculated to subserve justice between the parties. A different view from this appears to have been entertained in one case in Ohio;³ but it is so adverse both to principle and general authority, that we can hardly suppose it to be law even there. Indeed the decision did not proceed from the court of ultimate resort.

§ 238 [304]. A singular question arose before the Supreme

¹ *Perry v. Perry*, 2 Barb. Ch. 285. And see *Graves v. Graves*, 2 Paige, 62; post, § 253.

² *Hackney v. Hackney*, 9 Humph. 450; *Anderson v. Anderson*, 4 Greenl. 100; *Fishli v. Fishli*, 2 Litt. 337; *Tourtlot v. Tourtelot*, 4 Mass. 506.

³ *Smith v. Smith*, Wright, 643. See, as adverse to this, *Feigley v. Feigley*, 7 Md. 537.

Court of Errors of Connecticut, in the year 1810. It came up in a *qui tam* action, wherein the wife, who had obtained a divorce from the bond of matrimony, proceeded for the recovery of a statutory penalty against a party to whom the divorced husband had conveyed, as she alleged, certain property in fraud of her rights as the husband's creditor. And it was held by a majority of the court, Mitchell, C. J., and Baldwin and Reeve, Judges, dissenting, that, where the husband and wife, having determined to separate and dissolve as far as in them lay the obligations of their marriage, mutually covenanted, for him to secure a separate maintenance to her through the intervention of a trustee; for her to be no further chargeable to him; and for him, having committed adultery, and having had the venereal disease, to furnish money and testimony to procure a divorce, she instituting the necessary proceedings, to be under his direction, — the covenant was fraudulent and void, as tending to mislead the court, and interfere with the administration of justice. The judges concurred, that, if it had been agreed to produce false testimony, or to impose upon the court, the agreement would be a fraud on the law, and therefore void. But the dissenting judges contended, that no fraud appeared in the facts of this case; that, it being the duty of the husband to furnish his wife, who had no money, with the means to procure a divorce, and afterward to pay her alimony, there was no fraud in his voluntarily undertaking what he was already under legal obligation to do; and that, the object of the provision placing the control of the divorce suit in his hands having merely been, as shown in the evidence, to prevent the fact of his having had the venereal disease appearing, there was no imposition upon the court in omitting this part of the evidence, other sufficient proof existing. It seemed not to be denied, that a suit for divorce got up solely by the defendant, under his own control and for his own benefit, would, on such a state of facts appearing, be dismissed.¹

¹ Goodwin v. Goodwin, 4 Day, 343.

§ 239. It has been held, that an agreement made by a defendant in a divorce suit, to withdraw his or her papers, and make no defence, is void, as being against public policy; therefore a promissory note executed in pursuance of such an agreement and in consideration thereof, is a contract which cannot be enforced against the maker.¹ Also an agreement between the overseers of the poor and a husband whose wife is supported as a town charge, that the town will refrain from making opposition to a libel for divorce filed by the husband against the wife, has been held to be against public policy and void. It was observed by Sawyer, J., that the principle upon which *Sayles v. Sayles*² was decided applies here. "That," he said, "was the case of a promissory note, given in consideration of the libellee's forbearing to claim alimony out of the estate of the libellant, when the ground for claiming it was such as would constitute a defence to the libel. . . . This was a fraud upon the law, the policy of which is to guard and uphold the marriage relation with a watchful vigilance."³

§ 240 [305]. For the same reason which prevents a decree of divorce or nullity of marriage being rendered on the agreement of parties in court, or on the default of the defendant,⁴ and growing out of the fact that the public is a party also in these suits,⁵ we have the further doctrine, that no decree or sentence can be founded upon the sole evidence of the confessions of the defendant out of court. This is the

¹ *Stoutenburg v. Lybrand*, 13 Ohio State, 228.

² *Sayles v. Sayles*, 1 Fost. N. H. 312.

³ *Weeks v. Hill*, 38 N. H. 199, 204. As to the effect of an agreement not to bring a suit to avoid a voidable marriage, see *Wistby v. Wistby*, 1 Connor & Lawson, 537; where the Chancellor, after the death of one of the married parties, refused to set aside such an agreement, which had been entered into twenty years before, and acted upon subsequently. And see Vol. I. § 386. As to an agreement by the defendant not to resist the divorce suit, see *Viser v. Bertrand*, 14 Ark. 267. As to an agreement by the plaintiff to discontinue such suit, see *Sterling v. Sterling*, 12 Ga. 201. See also, *Ratcliff v. Ratcliff*, 1 Swab. & T. 467; *Lloyd v. Lloyd*, 1 Swab. & T. 567.

⁴ Ante, § 235.

⁵ Ante, § 230.

rule of the ancient as well as the modern common law. For, in Collet's case, it being suggested to the Court of King's Bench that persons who had lived together in wedlock sixteen years were proceeding in the Spiritual Court collusively, on the false allegation of incest, to dissolve their marriage and bastardize their children, — "they both appear and confess the matter, upon which a sentence of divorce was to pass," — it was held that the Spiritual Court should be restrained by prohibition from proceeding thus.¹

§ 241 [306]. This is also a rule of the canon law, founded on a decretal epistle of Pope Celestine III., and expressly renewed by the canons of 1597. "And how great need," says Gibson, "there was of such a prohibition, will appear to any one who shall consult the ancient acts of courts before those times; and see there how common it was to pronounce separations upon the sole confessions of the parties, and how numerous the separations were, so long as that continued to be the rule."² At present, or at least until the establishment of the new Matrimonial Court in 1858,³ the matter in England rests, or did rest, upon the 105th Canon of 1603, in the following words: "Forasmuch as matrimonial causes have been reckoned and reputed among the weightiest, and therefore require the greatest caution when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required upon any suggestion or pretext whatsoever to be dissolved or annulled, we do strictly charge and enjoin, that, in all proceedings in divorce⁴ and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as possible) be sifted out of the depositions of witnesses, and other lawful proofs and evictions, and that

¹ Collet's case, 2 Mod. 314.

² Gibs. Cod. 445; Cobbe v. Garston, Milward, 529, 537.

³ Vol. I. § 65.

⁴ This applies as well to separations *a mens et thoro* as to divorces *a vinculo*. Noverre v. Noverre, 1 Robertson, 428, 436; Savoie v. Ignogoso, 7 La. 281; Sawyer v. Sawyer, Walk. Mich. 48; ante, § 225. And see the observations of Lord Stowell, in Mortimer v. Mortimer, 2 Hag. Con. 310, 316, 4 Eng. Ec. 543, 546.

credit be not given to the sole confession of the parties themselves, however taken upon oath, either within or without the court."¹ This canon is in spirit and effect, probably in letter, common law in this country, our courts having uniformly proceeded upon its principles.² Some of the States, moreover, have substantially incorporated it into their statute law. Yet in two or three of the States, the legislature has established for the courts a more rigid rule.³

§ 242 [307]. Obviously, neither the canon nor the reason of the rule excludes the evidence of the defendant's confessions being heard. The interest of the community, or government, which we have described as the third party⁴ in matrimonial suits, extends merely to the establishing of the truth, not to the raising of technical objections.⁵ But if confessions were alone sufficient, the marriage would be placed at the will of the parties, in frustration of the entire policy of the law.⁶ And, as Dr. Lushington once observed, "no tribunal is to be trusted with the power to determine that which is impossible; namely, whether such a confession be genuine or false. Still it is evidence of the highest character; and I well recollect, in the case of *Mortimer v. Mortimer*,⁷ it was

¹ *Poynter Mar. & Div.* 338; *Gibs. Cod.* 445; see Vol. I. § 51.

² *Gould v. Gould*, 2 Aikens, 180; *Washburn v. Washburn*, 5 N. H. 195; *Baxter v. Baxter*, 1 Mass. 346; *Betts v. Betts*, 1 Johns. Ch. 197; *Montgomery v. Montgomery*, 3 Barb. Ch. 132; *Devanbagh v. Devanbagh*, 5 Paige, 554; *Holland v. Holland*, 2 Mass. 154; *Clutch v. Clutch*, Saxton, 474.

³ *Post*, § 250.

⁴ *Ante*, § 231.

⁵ *Ante*, § 237.

⁶ *Holland v. Holland*, 2 Mass. 154.

⁷ *Mortimer v. Mortimer*, 2 Hag. Con. 310, 4 Eng. Ec. 543. In *Pennsylvania*, Gibson, C. J., remarked: "It is a rule of policy not to found a sentence of divorce on confession alone. Yet when it is full, confidential, relevant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs." *Matchin v. Matchin*, 6 Barr, 332. "A species of evidence of the highest kind, provided always that it is accompanied with certain requisites, — first, undoubted proof that the admissions were made; second, that the expressions were clear and distinct; and, third, that the admissions were sincere." Dr. Lushington, in *Stone v. Stone*, 3 Notes Cas. 278, 286; *Betts v. Betts*, 1 Johns. Ch. 197; *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415, 417. See also Lord Brougham, in *Oreagh's divorce bill*, 32 *Legal Observer*, 91; *Harris v. Harris*, 2 Hag. Ec. 376,

strongly relied on by Lord Stowell. There must be other evidence, then; though I am not aware of any case in which the *quantum* or *description*, as auxiliary to a confession, has been the subject of discussion.”¹

§ 243 [308]. In considering confessions we must see, in the first place, that what is testified to does really amount to a confession.² This being determined, then the weight to be given it varies greatly according to the case and circumstances. In the suit for nullity, where a marriage regularly proved is attempted to be set aside as void from the beginning, what the defendant has admitted is received with particular caution;³ though, under some circumstances, it is entitled to much regard, even in this suit.⁴ Dr. Lushington indeed went so far, in a case of nullity, where the alleged defect was the undue publication of banns, as to make the following observations: “I place very little confidence in these subsequent declarations; and I think a grave doubt may be entertained, whether such subsequent declarations, in a case of this kind, made long after the marriage, are admissible as evidence; because, in these cases, one party or the other might by admissions affect the status of other parties, by reason that the interests of the parties in the cause are not confined to themselves, but extend to their children and to the public. The declaration of the wife may by possibility be evidence against the husband, or *vice versa*; but,

409, 4 Eng. Ec. 160, 175. But see *Hansley v. Hansley*, 10 Ire. 506. And see post, § 248.

¹ *Noverre v. Noverre*, 1 Robertson, 428, 440; *Armstrong v. Armstrong*, 32 Missis. 279, 288.

² *Stone v. Stone*, 3 Notes Cas. 278, 286, 291; *Tucker v. Tucker*, 11 Jur. 893, 5 Notes Cas. 458; *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160; *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415. A confession in general terms will apply to all times and places at which the proofs show the offence might have been committed. *Burgess v. Burgess*, 2 Hag. Con. 223, 227, 4 Eng. Ec. 527, 529.

³ *Searle v. Price*, 2 Hag. Con. 187, 4 Eng. Ec. 524; *Wright v. Elwood*, 1 Curt. Ec. 662, 666; *Cross v. Cross*, 3 Paige, 139; post, § 294.

⁴ *Harrison v. Harrison*, 4 E. F. Moore, 96; post, § 245, note.

where it affects the children, I doubt whether such declarations could be received."¹

§ 244 [309]. The rule regarding confessions is always to be interpreted in reference to its reason; which is, as we have seen, to prevent collusion, or prevent what actually happened before its adoption; namely, the obtaining of divorces where the grounds for them did not in fact exist.² Therefore the evidence to be introduced in connection with the evidence of the confession may be either, first, such as tends, like the confession, to prove the issue; or, secondly, tends to show the absence of collusion.

§ 245 [310]. Whether evidence showing merely the absence of collusion is sufficient in corroboration of the confession, without any tending to prove the direct fact in issue; or whether always there must be some evidence, outside the confession, of the direct fact involved,—is a point not apparently adjudged in England, though some English cases strongly imply the sufficiency of the former alone.³ In the

¹ *Brealy v. Reed*, 2 Curt. Ec. 835, 7 Eng. Ec. 328. And see *Cobbe v. Garston*, Milward, 529, where it was held by Dr. Radcliff, that, in a suit for nullity of marriage, the admissions of the defendant are admissible in evidence, yet still are entitled to but little weight. See, however, post, § 245, note.

² Ante, § 241; *Tucker v. Tucker*, 11 Jur. 898, 5 Notes Cas. 458; *Owen v. Owen*, 4 Hag. Ec. 261; *Tewksbury v. Tewksbury*, 4 How. Missis. 109; *Sawyer v. Sawyer*, Walk. Mich. 48, where it was held that the amount of evidence required to corroborate the confession of the defendant varies with the danger of collusion; *Shelford Mar. & Div.* 411; *Burgess v. Burgess*, 2 Hag. Con. 223, 4 Eng. Ec. 527.

³ *Harrison v. Harrison*, 4 E. F. Moore, 96, 103. It seems clear, that the corroborating evidence in this case merely showed the sincerity of the confession, and the consequent absence of collusion. The suit was for nullity of marriage, on the allegation of the husband's impotence. The examination of the lady (see 3 Curt. Ec. 16, 7 Eng. Ec. 359, where the case as it stood before the Consistory Court of London is reported) elicited nothing satisfactory; and the "evidence of Mrs. Dolphin," spoken of in the latter report, is probably what is alluded to in the following passage. In giving judgment in the Court of Privy Council for divorce, confirmatory of the decision of the Consistory Court, and of the Court of Arches, Lord Brougham said: "It has been insisted by the counsel for the appellant husband, the original defendant, 'that the confession of non-consummation is not sufficient to satisfy the 105th Canon, and that there must be some extrinsic proof,

United States, the former has been expressly held sufficient. Thus where, on a libel for divorce *a vinculo*, on account of adultery committed by the husband, it was proved that he had been fourteen years out of the commonwealth, separated from his wife, and that, in a letter to her, expressive of penitence and desiring a reconciliation, he acknowledged himself to have been living with another woman by whom he had five children; the court granted her prayer on the strength of the confession alone, since the circumstances proved by other evidence showed no collusion to exist in the case.¹ In another case the facts appearing were, that the alleged *particeps criminis* went late to the house where the defendant wife was residing, her husband being at sea, and remained there

and for that purpose proof by inspection is said to be essential. Their lordships give no opinion on this construction of the canon; for, if adminicular proof is requisite, they think the circumstance of the appellant's *having taken a legal opinion of the validity of the marriage*, which he admits in his answer, coupled with the confession of non-consummation, and the *refusal, in the first instance, to undergo inspection*, is sufficient extrinsic proof; and, being satisfied that there is no collusion between the parties, they affirm the decree of nullity." In *Noverre v. Noverre*, 1 Robertson, 428, the evidence, aside from the defendant wife's confession, went no further than to show extreme, not indecent, familiarities with the alleged paramour, and ample opportunities. In *Tucker v. Tucker*, 11 Jur. 893, there were no acts of familiarity proved; but there were the reception of a letter from the alleged paramour to the wife, which letter she had not read, and could not therefore know the contents of; and a meeting, not at all shown to be criminal, between her and him, after she was turned off by her husband; yet these were held amply sufficient to sustain the confession. See also *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3; *Owen v. Owen*, 4 Hag. Ec. 261; *Deane v. Deane*, 12 Jur. 63; *Mortimer v. Mortimer*, 2 Hag. Con. 310, 4 Eng. Ec. 543. It has been considered important to prove what is commonly termed the identity of the parties, by other evidence than confessions. *Searle v. Price*, 2 Hag. Con. 187.

¹ *Billings v. Billings*, 11 Pick. 461. A letter from the defendant, who was in Texas, to his friends in Louisiana, acknowledging that he was living with another wife there, being the only evidence offered, was, by the Louisiana court, adjudged insufficient proof of his adultery to authorize the divorce prayed. *Herman v. McLeland*, 16 La. 26. In *Clutch v. Clutch*, Saxton 474, it was testified, that the defendant had told the witness he had the venereal disease, which he had contracted in New York, and that a physician named was attending him. This evidence, standing alone, was very properly deemed inadequate; but the court remarked, that confessions "are never held sufficient without strong corroborating circumstances." *Hansley v. Hansley*, 10 Ire. 506, a North Carolina case, goes almost to the point of holding confessions altogether inadmissible.

about half an hour. The next morning she seemed to be in distress; said this person had been to the house, and she had committed a great sin. When her husband returned, she confessed to him, before witness, that she had committed adultery then. The evidence was deemed sufficient.¹ Indeed, the circumstances under which the confession was shown to have been made;² also the mere fact, appearing in the case, that the suit was plainly adverse in its character, and seriously resisted,³—have been severally held to establish the absence of collusion, so as to authorize the decree with no proof of the offence itself, outside the confession. But this is certainly carrying the point to the very verge.

§ 246. In England, since the transference of divorce jurisdiction from the Ecclesiastical Court to a new and special one, it has been laid down by the judges, in a case however in which the confessions were in fact held not to be sufficiently clear and certain, that, as observed by Cockburn, C. J., “as this court is not a court of ecclesiastical jurisdiction, nor bound in cases of divorce *a vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the court to act on such admissions, although there might be a total absence of all other evidence to support them.”⁴ It is difficult to perceive on what just ground an English court, proceeding upon the common law rules of evidence, can forbear to give effect to the common law as it stood before the canon was made, and of which the canon was but confirmatory; still, if the court should deem that the ecclesiastical judges had erred in some of their interpretations, it might well forbear to follow

¹ *Tewksbury v. Tewksbury*, 2 Dane Ab. 310.

² *Tewksbury v. Tewksbury*, *supra*.

³ *Vance v. Vance*, 8 Greenl. 132. And see *Baker v. Baker*, 13 Cal. 87. But see dictum in *McCulloch v. McCulloch*, 8 Blackf. 60.

⁴ *Robinson v. Robinson*, 1 Swab. & T. 362, 393.

them as to these. In Arkansas it was provided by statute, that "like process and proceedings shall be had in divorce cases as are had in other cases on the equity side of the court;" yet the court decided, that, notwithstanding the statute, a divorce could not be granted on a bill taken *pro confesso*, without evidence to establish the offence charged.¹

§ 247 [311]. It has been said, that, in England, under the former ecclesiastical procedure, "to prevent fraud in these cases, the practice is for the judge (all persons, especially the husband, being removed apart) to examine the woman as to the truth and cause of her confession, and to ascertain the truth by all other lawful ways and means. If there be fraud or deceit, or a probable suspicion of it, a sentence of divorce will not be granted, unless the adultery be otherwise satisfactorily proved."² The defendant, under the ecclesiastical practice, was required also, it seems, to give a negative issue, that is, to deny the charge; and the court was almost bound to reject an affirmative issue; but he could not be compelled either to give in a plea, or to administer interrogatories.³ In reality, however, whenever a fair case was made out, the relief was granted.⁴ It is difficult to see, how, on any proper principle of general law, the defendant can be compelled to plead negatively to an allegation he does not in fact deny. And this peculiarity of practice is explained by Coote, who says, that, on the admission of the libel, "the proctor for the defendant is *bound by the canon* to give a negative issue, in order to prevent the possibility of the parties colluding to deceive the court."⁵ Probably this practice is not to be followed here.

§ 248 [312]. While therefore confessions, as a species of evidence in matrimonial suits, should be received with cau-

¹ Welch v. Welch, 16 Ark. 527.

² Shelford Mar. & Div. 411; Conset, 280. See Oughton, tit. 213.

³ See ante, § 231.

⁴ Crewe v. Crewe, 8 Hag. Ec. 123, 131, 5 Eng. Ec. 45, 49.

⁵ Coote, Ec. Pract. 336.

tion, to be in all cases most accurately weighed; and while, under some circumstances, they are entitled to little or no consideration;¹ yet, on the other hand, "where there is less danger of collusion, or it could not be practised so easily, the corroborating facts and circumstances need not be of so decisive a character. . . . Where the circumstances of the case are such as to repel all suspicion of collusion, and leave in the mind of the court no doubt of the truth of the confessions, it should act accordingly."²

§ 249. In one case it was well observed: "None of the grounds relied on for a divorce are supported by any other evidence than the expressed and implied admissions of the defendant, made at a time and under circumstances which show, that, as his object was a reconciliation with his wife, he deemed it more advisable to acquiesce in her accusations, than to alienate her by a contradiction of them;" therefore, though this was not a case in which collusion was in any degree probable, the divorce was refused.³ And the language of the judges is not quite uniform as to the weight which the confession is to receive,—a fact which results as well from the differing circumstances under which confessions are contemplated, as from the somewhat differing views of the judges themselves. As we have already seen, the confession is sometimes regarded of but little weight, requiring strong corroborative evidence,⁴ and sometimes it is spoken of as being very weighty.⁵

¹ Ante, § 242; *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415; *Burgess v. Burgess*, 2 Hag. Con. 223, 4 Eng. Ec. 527.

² *Sawyer v. Sawyer*, Walk. Mich. 48. For a singular case of supposed confessions, found by a husband in the wife's private diary, and then produced in evidence against her, where, though they seemed on their face to be ample, they were held not to be so because of certain peculiarities of the wife as revealed in other parts of the diary, see *Robinson v. Robinson*, 1 Swab. & T. 362.

³ *Twyman v. Twyman*, 27 Misso. 383, opinion by Scott, J.

⁴ *Clutch v. Clutch*, Saxton, 474.

⁵ And see *Johns v. Johns*, 29 Ga. 718; *Bergen v. Bergen*, 22 Ill. 187; *McDermott's Appeal*, 8 Watts & S. 251; *Buckholts v. Buckholts*, 24 Ga. 238; *Sheffield v. Sheffield*, 3 Texas, 79.

§ 250 [313]. In some of the United States, the common law as to confessions has been considerably modified by statutes; though generally in this country, the same doctrine still prevails which we received from England.¹ The chief modification has been the introduction, in a few of the States, of the very unwise provision that confessions be not at all received, whereby a party is sometimes cut off from using the most conclusive evidence, to the utter denial of justice.² Concerning the interpretation of a statute of this kind it was observed, that, "where it becomes necessary to any *transaction* of either party, the conversation *bond fide* had, has been uniformly regarded as a part of it, and admissible; the court being careful to exclude every thing that could, by the most strict construction, be looked upon as originating in collusion, or the desire of either party to make evidence to favor the application of the other party."³ By the former statutes of Alabama, on a bill for divorce, the defendant was not required to swear to his answer; and the confessions of neither party were received in evidence. And it was held, that, where the defendant put in his answer in equity, denying under oath the adultery charged, evidence of two witnesses, or of one with corroborating circumstances, was not necessary.⁴

¹ Ante, § 241; *Shillinger v. Shillinger*, 14 Ill. 147; *Armstrong v. Armstrong*, 32 Missis. 279, 288.

² *Richardson v. Richardson*, 4 Port. 467; *Gray v. Gray*, 15 Ala. 779; *Jordan v. Jordan*, 17 Ala. 466; *Hansel v. Hansel*, Wright, 212; *Brainard v. Brainard*, Wright, 354; *Simons v. Simons*, 13 Texas, 468. But in Ohio, this statutory provision has been abandoned for another, more harmonious with the English rule. See Page on Div. 324, 325; *Sheffield v. Sheffield*, 3 Texas, 79, 88; *Wright v. Wright*, 3 Texas, 168, 176.

³ *Bascom v. Bascom*, Wright, 632. And see *Gray v. Gray*, 15 Ala. 779; *Cornelius v. Cornelius*, 31 Ala. 479.

⁴ *Moyler v. Moyler*, 11 Ala. 620. In a late Alabama case, the court, by Rice, J., observe, that the act of 1824 made confessions inadmissible in evidence in divorce cases; but the Code now in force provides, that "no decree can be rendered on the confessions of the parties." And they add: "The Code makes them *inadmissible*; but does not absolutely exclude them. It makes them *admissible*, but forbids the rendition of a decree for divorce when they constitute the only evidence of the alleged cause for divorce. It does not, however, forbid the rendition of such

§ 251. In California, a statute provides, that "no divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party, but in all cases the court shall require proof of the facts alleged, as the ground for a divorce." And it has been deemed, to use the language of the judge, that "the statute, being in affirmance of the common law, is to be construed as was the rule by that law." Therefore, where the rest of the testimony and the circumstances show, that there can be no collusion, and leave no doubt as to the truth of the confessions, the court may act upon them thus corroborated. And this doctrine was applied in a suit to declare a marriage null by reason of fraud practised by the defendant.¹

III. *The Issues in the Divorce Suit.*

§ 252. When we come to consider, in chapters further on, the pleadings and the incidents attendant upon the pleadings, in divorce suits, we shall pass under our review some matters relating to the issue, not to be discussed here. For example, the collateral question, whether or not the plaintiff has his domicile in the State wherein the proceeding is instituted, may be one of the issues involved, but whether it is or not is a matter to be considered in connection with the rules of pleading which govern these causes. Yet in the next following section we shall see what are the main issues.

§ 253 [314]. In every divorce suit, on whatever cause founded, the plaintiff must allege and prove, first, his marriage with the defendant; secondly, a sufficient breach of

decree when they do not constitute the only evidence, but are proved in conjunction with other circumstances and conduct, which confirm or tend to confirm them, and repel the idea of collusion between the parties. A decree for divorce rendered on confessions, *and conduct and circumstances*, is not a decree 'rendered on the confession of the parties,' within the meaning of the Code." *King v. King*, 28 Ala. 315, 319. And see further on this point, *Hanberry v. Hanberry*, 29 Ala. 719.

¹ *Baker v. Baker*, 13 Cal. 87. And see note to the last section.

matrimonial duty. He is then entitled, as against the defendant, to a divorce; unless the latter sets up and proves either, first, connivance, which may embrace some facts belonging also under the head of collusion; or, secondly, condonation; or, thirdly, recrimination; or, fourthly, unless the right is lost by the lapse of time, or by what is called the plaintiff's insincerity. As against third persons, sometimes permitted to intervene for the protection of their own interest, he is equally entitled to the divorce, unless they also establish some one of these defences. As against the public, represented by what is called the conscience of the court,¹ he is to the same extent entitled; only this party, not being a party of record, is never obliged to respond by plea to the plaintiff's allegations, and never loses its rights by laches;² and so, whenever a defence comes out in the proofs, whether alleged or not, it is fatal to the proceeding.³ A maxim in these suits therefore is, that a cause is never concluded as against the judge;⁴ and the court may, and to satisfy its conscience sometimes does, of its own motion, go into the inquiry of matters not involved in the pleadings.⁵

¹ Ante, § 231.

² Analogous to this point, there cannot be a nonsuit in criminal cases; because the king, or government, is said to be always present in court. *Rex v. Adamson*, Saville, 56.

³ *Crewe v. Crewe*, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 46; *Phillips v. Phillips*, 1 Robertson, 144, 156; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130; *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401, 411, 412; *Lovering v. Lovering*, 3 Hag. Ec. 85, 5 Eng. Ec. 27; *Mattox v. Mattox*, 2 Ohio, 233; *Smith v. Smith*, 4 Paige, 432; *Suggate v. Suggate*, 1 Swab. & T. 492. And see ante, § 234, 236, 237.

⁴ *Halford v. Halford*, 3 Phillim. 98, 103; *Hamerton v. Hamerton*, 2 Hag. Ec. 8, 24, note, 4 Eng. Ec. 13, 20. And see *Middleton v. Middleton*, 2 Hag. Ec. Supp. 134, 1 Eng. Ec. 299, 301; *Donellan v. Donellan*, 2 Hag. Ec. Supp. 144, 4 Eng. Ec. 304.

⁵ *Smith v. Smith*, 4 Paige, 432; *Morrell v. Morrell*, 3 Barb. 236. But see *Lewis v. Lewis*, 9 Ind. 105, which, however, was decided not in accordance with the general doctrine.

IV. *The course of Procedure in Outline, whereby the Issues are evolved and tried.*

§ 254. The first matter to be considered under this subtitle is, in what court the divorce suit is to be brought, and what is the usual course of proceeding in the court. Also, whether there are any statutes expressly directing what shall be the course of divorce procedure. In some of our States equity and law causes are heard, as in England, in distinct courts; but, in most of our States, at the present time, they go before the same set of judges, though the forms of procedure, when the case is in equity, may conform to the general equity practice, while, when it is at common law, they conform to the general common law practice. In some of our States of late, however, a general blending of equity and law forms has taken place,—and this seems to be the tendency of things, in those mutations which are effected by statutes, in this country. We have no Ecclesiastical Courts, as the reader has already been apprized, in any of our States. What is the result of this general condition of the facts upon our divorce practice is matter which was discussed in a general way in our first volume.¹ In some of our States the suit for divorce is to be brought before a court of common law; in others, before a court of equity; in others, before a court which has both equity and common law jurisdiction; and in all, the suit is more or less modified, as to the procedure, by the peculiar nature of the subject, and by the adoption of rules of practice from the Ecclesiastical Courts of England. The result therefore must be, and it is, that, in none of our States, is the procedure very well defined; while it somewhat differs, so far as it is defined, in the different States. It is the purpose of the author to attempt no very minute descent into the practice of particular States, yet to

¹ Vol. I. § 78-86. And see *Stokes v. Stokes*, 1 Misso. 320.

call the reader's attention to certain points of pretty general applicability.

§ 255. As to the court in which the suit is to be brought, and the county, and the like, perhaps a reference to some cases in a note may be useful. This is a matter depending so much upon local statutory law, changing also in the several States, that to attempt a particular discussion of it would be unwise. The law is not now, in all the States to the decisions of whose tribunals references are made in the note, the same as it was when the decisions were pronounced; at the same time, there may be involved in the decisions, principles of permanent applicability.¹

§ 256. The issue or issues which the pleadings may evolve, are, according to the course of the Ecclesiastical Courts, to be tried, not by a jury, but by the judge, who decides all questions both of law and of fact. And it is believed that this course is universally pursued in this country, except where a statute directly or by implication provides for a jury trial; yet, at present, jury trials are provided for in the greater number of our States. But where the proceeding is in equity, the court sometimes, it seems, without special direction of a statute, will order a feigned issue to be sent to a jury, as in other equity causes.²

¹ *Sharman v. Sharman*, 18 Texas, 521; *Reese v. Reese*, 23 Ala. 785; *Wiley v. Wiley*, 27 Ala. 704; *Conant v. Conant*, 10 Cal. 249; *Sanford v. Sanford*, 5 Day, 353; *Forrest v. Forrest*, 6 Duer, 102; *Fischli v. Fischli*, 1 Blackf. 360; *Varner v. Varner*, 3 Blackf. 163; *Smith v. Smith*, 4 Blackf. 132; *Fulton v. Fulton*, 36 Missis. 517; *Holloman v. Holloman*, 2 Dev. & Bat. Eq. 270; *Mattox v. Mattox*, 2 Ohio, 234; *Light v. Light*, 17 S. & R. 273; *Moore v. Moore*, 2 Mass. 117; *Lane v. Lane*, 2 Mass. 167; *Richardson v. Richardson*, 2 Mass. 153; *Squire v. Squire*, 3 Mass. 184; *Hopkins v. Hopkins*, 3 Mass. 158; *Carter v. Carter*, 6 Mass. 263; *Merry v. Merry*, 12 Mass. 312; *Williams v. Dormer*, 16 Jur. 366, 9 Eng. L. & Eq. 598; *Richmond v. Richmond*, 10 Yerg. 343; *Herron v. Herron*, 6 Ind. 129; *Gilbert v. Thomas*, 3 Kelly, 575; *Rice v. Tarver*, 4 Ga. 571, 582.

² See, as illustrating some of the matters mentioned in this section, *Morrell v. Morrell*, 1 Barb. 319; *Oliver v. Oliver*, 20 Miss. 261; *Carre v. Carre*, 2 Yeates, 207; *Miles v. Miles*, 2 Jones Eq. 21; *Richmond v. Richmond*, 10 Yerg. 343;

§ 257. It is in the power of all courts, in the trial of all manner of causes, to protect the parties against being injured by surprise and by other similar things; to rescind their interlocutory orders; to permit further evidence to be taken after publication; and the like; but there is nothing connected with divorce, as to these matters, worthy of very special mention.¹ It may however be observed, that, where the defendant suffers himself to be defaulted, and nothing remains but to satisfy the conscience of the court, as it is called, the judge will not always feel himself bound by so strict a rule, when asked for a second hearing, as he would be if the opposite party appeared, and so, his rights intervening, contested the application. Yet nothing can be very certainly said upon this point. Counsel should always go before the judge prepared to make out the full case.

§ 258. Suppose there is a verdict against a party, can he have a new trial? This question does not arise in divorce causes alone, it comes up for consideration in all other cases where there is a jury trial; and the rules which guide the discretion of the judge in ordinary cases seem to be applicable in causes of divorce. Thus, it is held in the English Divorce Court, that a verdict will not be set aside as against the weight of evidence, simply because the judge would himself have come to the contrary conclusion. The judge, said Cresswell, J., must be "*dissatisfied*", the word used by Lord Mansfield, which means something more than that he entertained a different opinion."² It was held in New York, when divorce causes were there heard in equity, and a feigned issue upon the fact alleged as foundation for the divorce was tried

Wood v. Wood, 5 Ire. 674; Devanbagh v. Devanbagh, 5 Paige, 554; Reavis v. Reavis, 1 Scam. 242; Stokes v. Stokes, 1 Misso. 320; Harrison v. Harrison, 7 Ire. 438; Bacon v. Bacon, 2 Swab. & T. 53; Smith v. Smith, 4 Paige, 432.

¹ See Hamerton v. Hamerton, 2 Hag. Ec. 618, 4 Eng. Ec. 224; Durant v. Durant, 2 Add. Ec. 267, 2 Eng. Ec. 298; Friend v. Friend, Wright, 639; Chamberlain v. Chamberlain, 2 Aikens, 232.

² Miller v. Miller, 2 Swab. & T. 427. See also, for decisions in this court, Hill v. Hill, 2 Swab. & T. 407; Stoate v. Stoate, 2 Swab. & T. 384.

before a jury, that, if the jury found the defendant guilty, and the judge did not believe him to be so, the sentence for divorce should not be passed upon this finding, but a new trial should be granted. And it was observed, that the object to be attained by the sending of the case to the jury, was, the protection of the defendant, who would not be protected if a divorce should be granted contrary to what the judge deemed to be the justice of the cause.¹ Yet in a later New York case the judge observed: "Our statute in relation to divorces has taken from the court the power of deciding upon the fact of adultery, where it is denied by the party charged, and conferred it upon the jury; and, although the court is authorized by the statute to grant a new trial as often as justice shall seem to require, yet it would seem to be proper that this court, in the exercise of this power, should follow the rules adopted by courts of law in granting new trials; and that, where there is conflicting evidence, a verdict should not be set aside simply because the court might think it to be against the weight of evidence, or would have decided differently from the jury." And it was deemed, that, in this matter, the same rules should be applied in divorce causes as in others.²

§ 259. There can be no new trial in a divorce case, by reason of evidence having been improperly rejected, if the rejected evidence, had it been received, would not have changed the result.³ If there is a verdict rendered contrary to the allegation contained in the pleadings of the party in whose favor it is given in, it will not avail him.⁴ And in a case, not of divorce, it was held, that a party cannot take advantage of his own conduct, in the management of his cause before the

¹ *Ferguson v. Ferguson*, 1 Barb. Ch. 604; s. p. in substance, *Moore v. Moore*, 22 Texas, 237. See *Mulock v. Mulock*, 1 Edw. Ch. 14; *Richmond v. Richmond*, 10 Yerg. 343; *O'Bryan v. O'Bryan*, 13 Misso. 16; *Vance v. Vance*, 17 Maine, 203.

² *Ferguson v. Ferguson*, 3 Sandf. 307, 308, opinion by Mason, J. And see *Bacon v. Bacon*, 2 Swab. & T. 53; *Kolb's case*, 4 Watts, 154.

³ *French v. French*, 14 Gray, 186. See also *Pinkard v. Pinkard*, 14 Texas, 356.

⁴ *Wood v. Wood*, 5 Ire. 674. And see *Stokes v. Stokes*, 1 Misso. 320.

jury, to avoid a verdict against himself. "It is not," said the judge, "for a party to complain, that the personal knowledge of jurors was appealed to by himself unsuccessfully. Having chosen to adopt, and been permitted without objection to pursue, an unusual course of argument, and having therein ventured to rely upon a species of evidence usually regarded as loose, uncertain, and dangerous in its character, he cannot take advantage of his own act and avoid a verdict against himself on account of his own conduct in the management of the cause before the jury."¹

§ 260. The foregoing observations refer to the question of new trials sought after verdict rendered, but before judgment; and sought in the same court in which the verdict was found. In a Missouri case it is laid down, that, upon an application for a new trial in a higher court, where the evidence in the divorce case is conflicting, and the decision of the lower tribunal trying the cause depends upon the credibility of witnesses, the superior court will not interfere.² In some of our States, and under some circumstances, appeals, exceptions, and the like, from the tribunal trying the divorce cause to a higher court, are allowable, but this matter does not demand discussion here. In another chapter, we shall consider the question of opening judgments for divorce, in cases of fraud, and in other cases, where a judgment final in form has been rendered.³

¹ *Nutting v. Herbert*, 37 N. H. 346, 354, opinion by Fowler, J.

² *Stevenson v. Stevenson*, 29 Misso. 95. And see *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195.

³ See *Hoffman v. Hoffman*, 6 Casey, 417; *Holloman v. Holloman*, 2 Dev. & Bat. Eq. 270; *Hunt v. Yeatman*, 3 Ohio, 16; *Hofmire v. Hofmire*, 7 Paige, 60; *Goodin v. Smith*, Milward, 236; *Frankfort v. Frankfort*, 3 Curt. Ec. 715, 7 Eng. Ec. 558; *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195; *Bogges v. Bogges*, 4 Dana, 307; *Dunn v. Dunn*, 4 Paige, 425; *Smith v. Smith*, 4 Paige, 432; *Phelps v. Phelps*, 7 Paige, 150; *Burr v. Burr*, 10 Paige, 166; *Jeans v. Jeans*, 3 Harring. Del. 136; *Sheafe v. Sheafe*, 9 Fost. N. H. 269; *Jungk v. Jungk*, 5 Iowa, 541; *Thornberry v. Thornberry*, 4 Litt. 252; *Maguire v. Maguire*, 7 Dana, 181; *Evans v. Evans*, 5 B. Monr. 278; *Pence v. Pence*, 6 B. Monr. 496; *Bourne v. Simpson*, 9 B. Monr. 454; *Hanberry v. Hanberry*, 29 Ala. 719; *Meyar v. Meyar*, 3 Met. Ky. 298; *Malony v. Malony*, 9 Rob. La. 116; *Smith v. Smith*, 20 Misso. 166; *Miller v. Miller*, 3

§ 261. "There are various other questions which might well be considered in connection with this general view of the proceedings in a divorce case; but we shall better discuss them in other connections. To sum up this matter in a single sentence it may be said, that the procedure in a divorce cause is the same with the procedure in any other before the same court, except as regards those particulars in which the statutes have otherwise provided, or the nature of the cause demands a different procedure, or some rule of the ecclesiastical law has found such a status before the court as permits it to stand in the place of the ordinary rules there prevailing.

V. *The Evidence of Marriage in the Divorce Suit.*

§ 262 [315]. Several of the foregoing issues are considered in separate chapters; but, in this chapter, we shall look at the evidence of the marriage; and, in a general way, at the other evidence. The necessity of proving the marriage arises, not only from the fact that it is an essential ingredient in the offence alleged, since no violation of matrimonial duty can take place where the matrimonial relation does not exist; but likewise from the consideration, that, as divorce is the suspension or dissolution of this relation, if there is no relation subsisting, there is nothing for the divorce to act upon.¹ And so marriage is the foundation of the whole proceeding;²

Binn. 30; *Andrews v. Andrews*, 5 S. & R. 374; *Price v. Price*, 10 Ohio State, 316; *Robbarts v. Robbarts*, 9 S. & R. 191; *Brentlinger v. Brentlinger*, 4 Rawle, 241; *Brom v. Brom*, 2 Whart. 94; *Bascom v. Bascom*, 7 Ohio, 2d pt. 125; *Tappan v. Tappan*, 6 Ohio State, 64.

¹ *Cooper v. Cooper*, 7 Ohio, 2d pt. 238; Ayl. Parer. 50. In like manner, a lawful marriage must be shown as the foundation of a suit for alimony; yet it has been intimated, that, for the purposes of this suit, if a man has treated and held out a woman as his wife, he shall be estopped thereby from denying that she is such. *McDonald v. Fleming*, 12 B. Monr. 285. And see *Trimble v. Trimble*, 2 Ind. 76; post, § 268. It is doubtful, however, whether this species of estoppel *in pais* ought to be allowed in suits between the parties.

² *Hamerton v. Hamerton*, 2 Hag. Ec. 8, 4 Eng. Ec. 13; *Zule v. Zule*, Saxton,

and the decree or sentence of divorce affirms the marriage, in form and effect,¹ as well as declares the separation.² In the ecclesiastical practice, when the defendant denies having entered into this relation, or denies the validity of it, the proceeding assumes the form of a suit for nullity: the question of the marriage is the first settled; and, if affirmed, the alleged breach of it is inquired into afterward.³ Where the defendant does not contest the marriage, the plaintiff must simply prove it, in connection with his other allegations.⁴ And the

94; *Guest v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548; *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158, 160; *Clowes v. Clowes*, 9 Jur. 356; *Sinclair v. Sinclair*, 1 Hag. Con. 294; 4 Eng. Ec. 412; *Williams v. Dormer*, 16 Jur. 366, 9 Eng. L. & Eq. 598; *Tarbell*, petitioner, 32 Maine, 589; *Wright v. Wright*, 6 Texas, 3; *Evans v. Evans*, 1 Swab. & T. 328; *Harman v. Harman*, 16 Ill. 85.

¹ Coote Ec. Pract. 346, 357.

² *Mayhew v. Mayhew*, 3 M. & S. 266, 3 Phillim. 11.

³ *Montague v. Montague*, 2 Add. Ec. 375, 2 Eng. Ec. 350; *Mayhew v. Mayhew*, 2 Phillim. 11, 1 Eng. Ec. 166; *Brown v. Brown*, 2 Hag. Ec. 5, 4 Eng. Ec. 11; *Robins v. Wolseley*, 2 Lee, 149, 6 Eng. Ec. 75. This is also the rule in Scotland. 1 Fras. Dom. Rel. 659.

⁴ In an old Massachusetts case it was held, that, on a libel for divorce from bed and board only, it is not necessary to prove the marriage, unless it is denied. *Hill v. Hill*, 2 Mass. 150. And the Court of Chancery, in Maryland, seems to have heard cases of divorce and alimony on bill and answer, without evidence of marriage beyond the admissions of the parties so obtained. See the cases cited in *Helms v. Franciscus*, 2 Bland, 544. See also, for Illinois, *Harman v. Harman*, 16 Ill. 85. In Maine, on a libel for divorce *a mens et thoro* for cruelty, where the respondent did not appear, and the counsel for the libellant cited the above case of *Hill v. Hill*, the court, without deciding the question in its application to suits where the respondent appears and admits the marriage, held, that, in a case situated like the one before the court, evidence of a legal marriage must be produced. The court said: "Possibly the other party might not have had actual knowledge of the pendency of the libel, even though it may have been served or published as the law requires; and, as the consequences of the divorce might seriously affect his estate in the matter of alimony, they would not decree a divorce from bed and board until it should appear that the parties had been legally married, and that the libellant was thereby entitled to her alimony by law." *Williams v. Williams*, 3 Greenl. 135. See also, *Jones v. Jones*, 18 Maine, 308. But the other authorities, English and American, require the marriage to be proved in suits for divorce from bed and board, as well as from the bond of matrimony; and they do not allow this fact, more than any other in the case, to be established by the sole admissions of the defendant. Plainly the canon, and the reason of it, must apply to the marriage, as much as to any other part of the plaintiff's case. See cases cited ante, § 241, 253.

defendant, in the ecclesiastical practice, was required either to deny or admit it, at once, on the introduction of the libel.¹

§ 263 [316]. In an early Massachusetts case, the court, declining to decide whether or not a marriage may be valid for some purposes and invalid for others, held, that to authorize a divorce, it must be good for all purposes. The marriage in question not being valid within the statute, the court considered the statute not to authorize its dissolution.² But if a marriage is a marriage at all, and, as such, binding for any purpose, no very obvious principle appears justifying the court in refusing to interfere. And in an English case, Dr. Lushington apparently laid down the proposition, that, if a marriage is so far good as to preclude its being set aside on a proceeding for nullity, it is sufficient to sustain a sentence of separation for adultery. "If I could not pronounce the marriage void," he said, "it almost follows, as it seems to me, that I must pronounce it valid for certain purposes; and, if for certain purposes, valid for the husband or wife, as the case might be, to obtain a separation for a violation of the marriage vow." The marriage under consideration was a contract *per verba de presenti*, entered into in a British colony, and the court—subsequently to the decision in *The Queen v. Millis*³—held it sufficient to authorize a divorce.⁴

§ 264 [316 a]. The question however still remains, whether

¹ Coote Ec. Pract. 336.

² *Mangue v. Mangue*, 1 Mass. 240.

³ Vol. I. 275-278.

⁴ *Catterall v. Catterall*, 1 Robertson, 580, 581, 583. And see Vol. I. § 278. See also *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 330, where Lord Stowell remarked, that "all persons who stand in the relation of husband and wife, in any way the law allows, as by a foreign marriage, or by a domestic marriage not contrary to law, have claim to relief on the violation of any matrimonial duty." In the United States, where the contract *per verba de presenti* alone is held to be a good marriage at common law, it is difficult to see how this question can practically arise; for the relation of husband and wife, it seems to me, must either exist or not exist, the law having made no provision for an intermediate state. There may be issues in which the *proof* of a particular marriage would fail, when it would prevail in other issues; but this is mere matter of *evidence*.

a *voidable* marriage, in distinction from a void one, is sufficient as the foundation of a suit for divorce. We have no American authority conclusive of this point, but plainly it could not be so in the English ecclesiastical tribunals; and a single reference to what is said in our chapter concerning Void and Voidable in Marriage,¹ will make this proposition plain. There is an English case, in which a further proposition was debated by Dr. Lushington, but not decided; namely, suppose a party is sued for divorce for some cause arising subsequently to the nuptials, and one of the parties is shown in evidence to have been, at the time of the nuptials, physically impotent, rendering therefore the marriage voidable; yet a further fact appears, that the right to avoid the marriage for this defect could not practically be availed of, in consequence of insincerity or delay in the one injured thereby, — Could, in these circumstances, the plaintiff rely on this marriage as a foundation for the divorce?² Notwithstanding the English doctrine does not allow a voidable marriage to be sufficient, the consequence may not follow, that, in our States, and under all circumstances in which the question could arise in our jurisprudence, it will be insufficient with us. And an Illinois case seems to lay down the doctrine, that, in divorce suits, only the fact of a marriage need be proved, not its legality. This, however, would doubtless be everywhere sufficient *prima facie* evidence of a valid and legal marriage. Yet Scates, J., observed: "I apprehend a mere *de facto* or cohabitation marriage, and an unlawful marriage, such as is void as being within the degrees of consanguinity, or between white and colored persons, may be dissolved by decree, or declared void. Rev. Stats. 1845, p. 196, § 1."³

§ 265 [317]. In suits for nullity of marriage, as in suits for divorce, the marriage sought to be set aside must be

¹ Vol. I. § 105 et seq.

² Anonymous, Deane & Swabey, 295.

³ Harman v. Harman, 16 Ill. 85.

proved.¹ Yet the rules governing the proof, as to quantity and kind, in suits for nullity, seem not to be well defined. In an English case,—where the marriage was celebrated in Scotland, and the ground of nullity alleged was that the defendant wife had a former husband living at the time of its celebration,—Dr. Swaby, after remarking that the direct evidence of the fact of the marriage in respect to which the sentence of nullity was prayed, was not satisfactory, added: “Nor is this lack of *primary* evidence at all compensated for by any *secondary* proof in the cause; as of consummation, cohabitation, mutual acknowledgments, &c. For, even granting such secondary proof to be admissible in the case, which is very doubtful (it being a case brought *inter vivos*, and by the one against the other contracting party), save only in corroboration of other and more direct testimony—namely, that of persons *present* (there being persons still living vouched to have been present) at the alleged fact of marriage,—yet still, of the little of such *secondary* proof as appears in the cause, the whole is extra-libellate, and so, strictly speaking, no proof.” But he admitted, on the authority of former decisions, that, if the suit were prosecuted by a person other than one of the parties to the marriage, and the proof of the fact of marriage were not in the power of such a plaintiff, it might, without this proof, be declared void. Under the latter state of facts, the decree of the court would pronounce the marriage “void, *if any such were had*.”² Under the former, and as the general rule, the decree affirms the fact of the pretended marriage, as well as pronounces it void.³

§ 266 [318]. The amount and species of proof necessary to establish a marriage, in suits for divorce and separation, seem also not to be very clearly defined upon authority.⁴ In our first volume, the general subject of the evidence by which

¹ *Anghie v. Anghie*, 1 Phillim. 201, 1 Eng. Ec. 72.

² *Nokes v. Milward*, 2 Add. Ec. 386, 2 Eng. Ec. 356, and cases in the notes.

³ *Coots Ec. Pract.* 402, 424.

⁴ *Cood v. Cood*, 1 Curt. Ec. 755, 6 Eng. Ec. 452, 456.

a marriage is established was discussed at large, and it only remains for us here to inquire into the matter as concerns specifically the suit for divorce. The material question is, whether what is sometimes termed a fact of marriage must be shown, as in indictments and actions for seduction; or whether such evidence as of cohabitation and repute, which derives its significance from the legal presumption of innocence, is sufficient. In divorce bills before the House of Lords, "the usual course," says Macqueen, "is to produce and prove an examined copy of the entry in the marriage register; and then to call a witness who was present at the ceremony, and acquainted with the parties. Such evidence, however, cannot always be obtained. But the best proof must be tendered that the circumstances of the case will admit of."¹ In the ecclesiastical courts, the libel for divorce, whether for adultery or for cruelty, used to plead in form both a fact of marriage celebrated according to law, and cohabitation and repute following.² When we consider the course of proceeding in these courts, the conclusion to be drawn from this form of pleading is simply, that proof of cohabitation and repute is *relevant* to the issue; but whether it is *sufficient* of itself, we must learn elsewhere.

§ 267 [319]. In a suit in Ireland for jactitation of marriage, where, as is not always or necessarily the case in this suit,³ a marriage legally solemnized was set up in defence; and where the clergyman who, it was said, performed the ceremony, was not living; and one of the two witnesses was dead also, and the other witness could not identify the parties; an attempt was made to prove the marriage by circumstantial evidence. Dr. Radcliff held, that the circumstances made to appear were insufficient, but added: "It is proper to contradict a notion, that a marriage in such a case could not be proved by circumstances, cohabitation, and acknowledgment."⁴

¹ Macqueen H. L. Pract. 535.

³ Post, § 290.

² Coote Ec. Pract. 320, 350.

⁴ Bodkin v. Case, Milward, 355, 361.

§ 268 [320]. In Virginia, in an equity suit by the wife against the husband for alimony, on the allegation of his desertion and refusal to support her, the marriage being denied by him in his answer, evidence of his former admissions, of cohabitation, and general repute, without any more direct proof, was held to be enough. And the Chancellor distinguished this case from indictments and actions for criminal conversation, in which is charged a crime resting on the marriage alleged. "But the *virtuous* act of matrimony," he added, "may in this case, as in many others, be proved by cohabitation, name, reputation, and other circumstances."¹ So in Alabama,² Texas,³ Indiana,⁴ and Illinois,⁵ evidence of cohabitation, and repute, and the like, seems to have been deemed sufficient in proof of marriage, in divorce suits.

§ 269 [321]. In the English case of *Mellin v. Mellin*, decided in 1838 by the Privy Council, Lord Brougham said, that a sentence of divorce from bed, board, and mutual cohabitation "can only be pronounced upon strict proof of the status of the parties;" but there was no discussion, as to what would be considered strict proof.⁶ In *Cood v. Cood*, which was a suit for divorce on the ground of adultery, it was in evidence, that the parties were on a voyage, in Barbadoes, and there intended to be married; that the witness wrote to the governor for a special license; and that, after what was assumed to have been the ceremony performed, they returned to the ship as husband and wife, and were so treated. Dr. Lushington would not decide whether this was alone sufficient evidence; there being other evidence, making, with this, the point satisfactory.⁷

¹ *Purcell v. Purcell*, 4 Hen. & Munf. 507, 512.

² *Morris v. Morris*, 20 Ala. 168.

³ *Wright v. Wright*, 6 Texas, 3.

⁴ *Trimble v. Trimble*, 2 Ind. 76.

⁵ *Harman v. Harman*, 16 Ill. 86.

⁶ *Mellin v. Mellin*, 2 E. F. Moore, 493.

⁷ *Cood v. Cood*, 1 Curt. Ec. 755, 6 Eng. Ec. 452. See also *Hervey v. Hervey*, 2 W. Bl. 377; *Kenrick v. Kenrick*, 4 Hag. Ec. 114, 129; *Duncan v. Duncan*, 2 Monthly Law Mag. 612; *Mitchell v. Mitchell*, 11 Vt. 134; *Haupt v. Haupt*, Wright, 156; s. c. 5 Ohio, 539; *Prince v. Prince*, 1 Rich. Eq. 282.

§ 270 [322]. In the later case of *Saunders v. Saunders*, which was a suit for divorce on the ground of cruelty, a marriage in Scotland was pleaded, and the entry in the Scotch register offered as an exhibit. On the question of admitting the libel, Dr. Lushington observed: "Now I apprehend, that some difficulty will necessarily arise from the admission of this exhibit, for these registers are not kept by any official person. [*Robertson*.—These certificates have always been received in evidence by the courts in Scotland.¹] You must be aware, that banns are not proclaimed in one case in fifty in Scotland; and it does appear to me, that, this being nothing more than a certificate of the session clerk, and he not being authorized by the law of Scotland to keep a register, when we come to the proof of this marriage we shall have much difficulty in establishing it upon this document. You must have the evidence of persons who were present at the marriage, for I do not think that I shall receive this certificate. The fact of marriage, in these proceedings and in actions for criminal conversation, must be proved in a different manner from a marriage in all other cases whatever. I am not aware that there is any law establishing a register of marriages in Scotland."²

§ 271 [323]. In a criminal suit for incest, before the same judge, in the Consistory Court of London, some observations fell from him which might lead to the inference, that the proof of marriage varies with the tribunal in which it is offered. But if there are rules of evidence peculiar to the Ecclesiastical Courts, they can have no peculiar force elsewhere; for it is a general truth, that whatever evidence will establish a given fact in a given issue before one tribunal, will do the same, under like circumstances, before another. Indeed it must be so while the law is a science, and judicial proceedings are carried on to ascertain facts. The question

¹ Tait on Evidence, 53.

² *Saunders v. Saunders*, 10 Jur. 143, 144. The home registry of an India marriage was admitted in *Ratcliff v. Ratcliff*, 1 Swab. & T. 467. See Vol. I. § 460 et seq.

was one of pedigree, involving the proof of marriage, and the learned judge said: "In considering, further, whether I am entitled to dispense with the production of the register, I must look to the practice of the court in which I am sitting; and it has been the practice to require the production of the register where it could be obtained, and I should be reluctant, unless necessity compelled me, to relax the rule. I must however observe, that I am satisfied that a register is not to be considered the best evidence of a marriage, nor has it ever been so considered in the books and authorities on the question. The rule respecting best evidence is, that you are not allowed, where there is evidence of a superior character, to give inferior evidence, unless you account for the non-production of the best evidence; the effect of which is to exclude all other evidence, till the absence of the best evidence is accounted for. But I am of opinion, that the register is not, in contemplation of law, the best of evidence; for these reasons: first, that registration is not necessary for the marriage itself; secondly, that no error or blunder in the register could affect the validity of the marriage; and, thirdly, that registration is not like an agreement or a deed in writing, and the contents of which cannot be proved by *viva voce* evidence, but it is a mere record afterwards of what has been done; and no doubt a very important record, to those who enter into the compact; but it is a mere memorandum of the compact they enter into, not the compact itself. I am encouraged in this opinion by the course of practice in the courts of law, which consider, that, in order to establish a marriage, the evidence of any one person present at the marriage is sufficient, without calling for the register at all."¹

§ 272 [324]. On a review of the authorities, therefore, we find ourselves as far from coming to a satisfactory conclusion, as if no authorities concerning the proof of marriage in matrimonial causes existed. Let us, then, inquire how the question stands on principle, and on those doctrines of the

¹ Woods v. Woods, 2 Cart. Ec. 516, 7 Eng. Ec. 181, 184.

law of evidence which have been applied to the proof of marriage in other issues. This is not the place to review the cases decided on other issues, and the principles governing those cases, — that work was performed in our first volume; but let it here be stated, that such an examination led us, in our first volume, to the following result: When parties are living together as husband and wife, the legal presumption, favoring innocence, is, that they are persons married to one another, and not persons living in the violation of morality and decency and law. But when the issue, to be decided in the case, is such as to show that the one against whom it is decided had violated morality and decency and law if the other party were married to a third person, then no presumption of such marriage can arise simply from cohabitation as husband and wife. Thus, if a man is sued in an action of criminal conversation, and the evidence is, that the plaintiff lived in the way of marriage with a particular woman, and the defendant had sexual intercourse with the same woman, plainly either the plaintiff or the defendant has violated morality and decency and law; but the court will not suffer it to be inferred from this balanced presumption, which of the parties is innocent, and which is guilty. Therefore in this issue, and in the issue which rests on the same reason in an indictment for adultery, there must be direct proof of the marriage, in distinction from this presumptive evidence.¹ Where the direct proof is required, the expression of the courts sometimes is, that *a fact of marriage* must be established, — an expression neither very apt in itself, nor always well understood by those who have used it.

§ 273 [325]. Applying the distinction stated in the last section to the divorce suit, we have the following result: If the allegation is of adultery, the marriage cannot be sufficiently inferred from the matrimonial cohabitation of the parties to the suit; though with the added reputation of their

¹ See also Vol. I. § 444 and other sections in the same connection; *Clayton v. Wardell*, 5 Barb. 214, 4 Comst. 230; *Holmes v. Holmes*, 6 La. 463.

being married persons, which reputation follows merely as a shadow from the fact of their dwelling together; because the same benign presumption of law which would infer, from this living together, an actual marriage, in order to prevent the inference of an offence having been committed, would in like manner and for the same reason infer a marriage between the defendant and the *particeps criminis*; which latter inference would conflict with and neutralize the former. Therefore plainly, upon principle, what is called an actual marriage must be proved in this issue.

§ 274. The general doctrine indicated in the last section is fully sustained by a late California case. There it was held, that, in a divorce suit founded on adultery, the marriage will not be inferred from matrimonial cohabitation, with the reputation of being married persons, where the result of such inference is to prove the defendant guilty of polygamy. It was a case in which the defendant had been married to the alleged *particeps criminis*. Said Cope, J.: "The general rule, that in actions of this nature the marriage may be inferred from the cohabitation of the parties, we do not understand to be applicable. We cannot indulge this inference without presuming that the defendant has been guilty of the crime of bigamy, and the fact that it involves such a presumption is sufficient to repel it. In the absence of criminative proof, it is never to be supposed, as a matter of legal presumption, that a person has violated the criminal law; and the presumption in favor of innocence, says a learned writer, is not confined to proceedings instituted with a view of punishing the supposed offence, but holds in all civil suits where it comes collaterally in question." And the court further deemed this result not to be prevented by the statute, which, as the judge observed, "provides, that in prosecutions for bigamy it shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence, but that the same may be proved by such evidence as is admissible to prove a marriage in other cases." The effect of this statute was merely to dispense with the record as evidence. The

judge further added: "The clause providing that the marriage may be proved by such evidence as is admissible to prove a marriage in other cases, does not derogate from this view; for in other cases there is no uniform rule upon the subject."¹

§ 275 [325]. Whether, in cases of cruelty, there must be proof of this marriage in fact, depends perhaps on the question, whether, within the meaning of our rule, acts of cruelty are to be regarded, like acts of adultery, as violations of morality and decency and law. Lord Stowell seemed to consider them to be so; for, in pronouncing his masterly judgment in *Evans v. Evans*, which was a suit for cruelty, he said: "The case indeed is civil, as has been repeatedly observed, *but the facts undoubtedly are criminal.*"² On the other hand, if they are regarded as criminal, are they more so, or less, if the parties are married, than if they are not? Because, though they should be deemed criminal, if their criminality was not connected at all with the fact of the marriage, it could not enter into the consideration of the question. Then, in the suit for desertion, the evidence of marriage, derived from the former cohabitation of the parties, must be greatly weakened by the subsequent desertion. But we need not speculate where the lamp of judicial authority goes not before.

§ 276 [326]. In some of the United States, legislation has somewhat relieved the courts of any technical rules, by providing, that, in all causes of divorce, evidence of cohabitation and repute, and other like circumstantial testimony, shall be competent. On this matter, however, the reader is referred to some observations to be found in our first volume.³

¹ *Case v. Case*, 17 Cal. 598, 600, 601, 602.

² *Evans v. Evans*, 1 Hag. Con. 35, 4 Eng. Ec. 310, 313. In Massachusetts, though there is no direct reported decision, I have understood it to have been always the custom of the courts to require the marriage, in divorce cases, to be proved in the same way as in indictments and actions for criminal conversation, until Stat. 1840, c. 84, established another rule. See also ante, § 268, 270.

³ Vol. I, § 543-545.

VI. *The Proofs and Witnesses.*

§ 277 [327]. Under the present sub-title, we shall mention only certain points; because, in other connections, we examine the evidence pertaining to specific subjects treated of. In a suit for nullity of marriage, by reason of a former marriage still subsisting, the person with whom such former marriage was contracted cannot be a witness to prove it.¹

§ 278 [328]. The plaintiff, let us observe as a general point, must establish the offence which he alleges. In England, all issues of fact as well as of law were tried by the court, while these causes belonged to the ecclesiastical tribunals; but now, under Stat. 20 & 21 Vict. c. 85, § 28, 36, the court has a discretion always to submit questions of fact to a jury, and in some circumstances is compelled to do so, if either party requests. Generally in the United States, the court used to try the issue in divorce causes; but, in consequence of legislation, this issue is in many of the States submitted to a jury, as in a suit at common law. In respect to the trial by the court, Dr. Lushington once observed: "Discharging the united functions of judge and jury, it is not sufficient for the court to have a moral conviction of the guilt of the party—it must be satisfied that such conviction is founded on legal evidence, applicable to legal charges." And in applying these observations to the pleadings and proofs before him, he added: "Looking at these facts, I am compelled to say, that the proof, judicially considered, is not sufficient, in my opinion, to support the charge. Moral conviction is the opinion of a jury without a judge; judicial conviction ought to combine both. I must have adequate legal proof, and I am not satisfied that this is adequate. Many cases have occurred, and frequently will occur, in which mere opinion may be one

¹ Cobbe v. Garston, Milward, 529. And see Searle v. Price, 2 Hag. Con. 187, note, 4 Eng. Ec. 524.

way, but judicial decision the other.”¹ It may be observed, that cases of this kind used more frequently to arise in England than they do in the United States; because here we are not embarrassed by the rule requiring the concurrent testimony of two witnesses, or of one with corroborating circumstances,² — which rule is now probably abolished in England by Stat. 20 & 21 Vict. c. 85, § 48, the words of which are: “The rules of evidence observed in the superior courts of common law at Westminster shall be applicable to, and observed in, the trial of all questions of fact in the court” now established for the investigation of these questions. Yet here, as the plaintiff must prove his case, the judge, where the trial of fact is by him, must be affirmatively satisfied, by the legal evidence before him, of the defendant’s guilt, or he cannot proceed to the decree.³ And if the plaintiff sets up a false case, the suspicions of the judge will be particularly aroused.⁴ So while “allegation without proof passes for nothing, proof without allegation passes for nothing. This is the rule in reference to all proceedings in court.”⁵

§ 279 [329]. It is hardly necessary to state, that, where a cause of divorce has occurred, the marriage is not dissolved thereby; but remains in full force until the sentence of the court declares its dissolution.⁶

§ 280 [330]. One general observation may be made concerning witnesses in these suits. The witnesses are often the relatives, friends, or dependents of one or both of the parties; and so they have usually a strong feeling, perhaps a prejudice, in favor of one or the other of them. Still their testimony is not to be therefore rejected;⁷ but, in weighing

¹ *Caton v. Caton*, 13 Jur. 431, 432, 433.

² *Atkins v. Atkins*, Vol. 1, § 729, note.

³ *Friend v. Friend*, Wright, 639. And see *Brainard v. Brainard*, Wright, 354.

⁴ *Dunn v. Dunn*, 2 Phillim. 403, 1 Eng. Ec. 280, 285.

⁵ *Foy v. Foy*, 13 Ire. 90, 95; *Johnson v. Johnson*, 4 Wis. 135.

⁶ *Wells v. Thompson*, 13 Ala. 793.

⁷ *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 282, 7 Eng. Ec. 114, 115.

it, the court will take into consideration all the circumstances by which it may be affected. This subject has received the frequent animadversion of the English judges; and they have considered, that, in matters of opinion, such witnesses are to be distrusted; in matters of fact, to be credited. The presumption is, that near relatives will be biassed toward those to whom they are related, servants and dependents toward those by whom they are employed. In respect to the children of the parties, no such presumption arises either way, but they are liable to bias and partisanship.¹

§ 281. The foregoing, somewhat detached points, are all which it was deemed necessary to be inserted in this connection, in the earlier editions of this work. Something more should be added here. As already intimated, one witness, uncorroborated was not received as sufficient in the ecclesiastical courts to establish any fact;² as, for instance, to prove a charge of adultery.³ But in civil ecclesiastical suits, which class includes divorce suits, the defendant was, as already explained,⁴ obliged to answer under oath the plaintiff's allegations,—the object of the answers being to benefit the party requiring them, and, in the words of Sir John Nicholl, “to save the necessity of taking evidence;” and, in cases other than divorce, no witnesses are necessary to corroborate the answers, and the court may proceed to sentence upon them alone.⁵ “The right of the party to exact answers depends on the form of proceeding. If the suit be prosecuted by articles [that is, if it be a suit criminal in form], on no

¹ *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 289, 7 Eng. Ec. 114, 118; *Saunders v. Saunders*, 5 Notes Cas. 413, 417, 1 Robertson, 549, 555; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 782, 3 Eng. Ec. 329, 335; *Dillon v. Dillon*, 3 Curt. Ec. 86, 102, 7 Eng. Ec. 377. And see *The State v. Nash*, 8 Ire. 35; *Cioccio v. Cioccio*, 26 Eng. L. & Eq. 604, 613, 1 Spinks, 121; *Chesnut v. Chesnut*, 1 Spinks, 196; *s. c. nom. C. v. C.* 28 Eng. L. & Eq. 603.

² 2 Burn Ec. Law, 238, *tit.* Evidence.

³ *Evans v. Evans*, 1 Robertson, 165.

⁴ Ante, § 217.

⁵ *Clutton v. Cherry*, 2 Phillim. 373, 385; *Morgan v. Hopkins*, 2 Phillim. 582, 584; *Clarke v. Douce*, 2 Phillim. 335, 339; *Saunders v. Saunders*, 11 Jur. 738, 1 Robertson, 549.

account can answers be at all exacted. In a civil cause, a contrary rule prevails, answers are due; but engrafted on that rule is this exception, that the party giving in his answers is entitled to object to so much of a plea as may criminate himself." Therefore where the suit was for divorce on the ground of adultery, the learned judge held, that the defendant wife was not bound to answer to matters alleged, which, though not criminatory on their face, might by possibility furnish a link in the chain of evidence against herself.¹ The answer is evidence only when read as such by the opposite party, who may, if he pleases, decline to read it altogether;² though, under peculiar circumstances, the court will, of its own motion, look into the answers.³

§ 282. Now, the common law rule does not require two witnesses, or one witness with corroborating circumstances, to establish any fact; and no case has ever occurred in this country, and found its way into the published reports, wherein this doctrine of the ecclesiastical courts has been enforced. Neither is there any case wherein the personal answers of the parties to each other's allegations, considered purely as matter of evidence and not of pleading, and concerning the main matter of the cause, have been required to stand in the place of the proofs by witnesses. How it is in respect to the allegation of faculties, and the like, we shall consider in another chapter. When the proceeding is in equity, and the defendant answers the bill, the effect of such an answer depends upon principles not necessary to be here particularly discussed.⁴ In England at present, by force of statutes, the parties can

¹ *King v. King*, 2 Robertson, 153. And see *Schulters v. Hodgson*, 1 Add. Ec. 105; *Dysart v. Dysart*, 5 Curt. Ec. 543; *Simmons v. Simmons*, 1 Robertson, 566.

² *Oliver v. Heathcote*, 2 Add. Ec. 35, 41; *Saunders v. Saunders*, 11 Jur. 738, 1 Robertson, 549.

³ *Dalrymple v. Dalrymple*, 2 Hag. Con. 54, 127; *Best v. Best*, 2 Phillim. 161, 169.

⁴ See *Moyler v. Moyler*, 11 Ala. 620; *Hughes v. Hughes*, 19 Ala. 307; *Richmond v. Richmond*, 10 Yerg. 343; *Mosser v. Mosser*, 29 Ala. 313; *Miller v. Miller*, Saxton, 386.

respectively take the stand as witnesses in divorce causes; yet neither one can compel the other to testify to adultery, or otherwise to criminate himself.¹ And there are some of our States in which a like result comes through recent legislation.

§ 283. In Maine, it having been provided by statute, that "no person shall be excused or excluded from being a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same, as party or otherwise," except, &c. (the exceptions not being important to the point), the court held, that the libellant, in a divorce cause, could not be a witness for himself under this statute. It was observed by the judge, that the common law disqualification of husband and wife to be witnesses against each other, rests upon other principles than "interest in the event of the suit, as party or otherwise." "Its foundation is in the public good. It strikes deeper than mere questions of interest, and is based upon reasons of public policy."² So in Vermont, where a statute provided, that "no person shall be disqualified as a witness in any civil suit or proceeding, at law or in equity, by reason of his interest in the event of the same, as a party or otherwise," husband and wife were held not to be competent to testify on the main issue in a divorce suit brought by the one against the other. It was deemed that the statute did not remove the rule of policy on which the exclusion properly rests.³

§ 284. In Massachusetts, it was provided by Stat. 1857, c. 305, reënacted Gen. Stats. c. 131, § 14, that the parties might be witnesses in civil actions and proceedings, including, among the rest, "divorce suits (except those in which a divorce is sought on the ground of alleged adultery of either party)"; and it was added, that "in any such case

¹ And see, on this subject, *Pyne v. Pyne*, 1 Swab. & T. 178.

² *Dwelly v. Dwelly*, 46 Maine, 377, opinion by May, J.

³ *Manchester v. Manchester*, 24 Vt. 649.

in which the wife is a party or one of the parties, she and her husband shall be competent witnesses for and against each other, but they shall not be allowed to testify as to private conversations with each other." And it was observed by Dewey, J., in giving interpretation to this latter clause: " Mere abusive language, addressed by one party to the other, when they were not in conversation, might be the subject of testimony by the party to whom it was addressed, and would be competent evidence."¹

§ 285 [447]. In cases of adultery, the custom of the ecclesiastical courts has been to interrogate the witnesses respecting their belief, whether, at the times testified to by them, adultery was in fact committed. The reason assigned is, that the judge, though not bound by the opinion given, has a right to know what the opinion is, and sometimes he places reliance upon it.² Yet if a witness stops short, and declines or omits to state his belief of the consummation of the offence, the judge, put on his guard to see whether there is any ground for the witness's scepticism, draws his own conclusion, which, instead of the witness's, must prevail.³ This course is a wide departure from ordinary rules of evidence; and there is no reported instance of its having been followed in any of the American tribunals. Perhaps it may be deemed a peculiarity, like that of requiring more than one witness to the principal fact,⁴ attaching to the ecclesiastical courts, rather than to the subject-matter, and not to be followed elsewhere;⁵ or perhaps it may do when the judge is to decide upon the effect of the testimony, while it would be unsafe to submit such evidence to a jury.⁶

¹ French v. French, 14 Gray, 186, 188.

² Crewe v. Crewe, 3 Hag. Ec. 123, 5 Eng. Ec. 45, 47, 51.

³ Elwes v. Elwes, 1 Hag. Con. 269, 4 Eng. Ec. 401, 405. And see Atkinson v. Atkinson, 2 Add. Ec. 484, 2 Eng. Ec. 387.

⁴ Simmons v. Simmons, 5 Notes Cas. 324, 11 Jur. 830; Evans v. Evans, 1 Robertson, 165.

⁵ See 2 Greenl. Ev. 3d ed. § 42; Atkins v. Atkins, Vol. I. § 729, note; Dunlap v. Dunlap, Wright, 559; Sheffield v. Sheffield, 3 Texas, 79.

⁶ And See Cameron v. The State, 14 Ala. 546. In the case of Leary v. Leary,

§ 286. In a Pennsylvania case, Lowrie, C. J., observed: "The mere opinions of the witnesses about the probable effect of the husband's conduct on the wife were, of course, improper evidence."¹ Upon an indictment for adultery before the Alabama court it was held, that the witnesses must depose to facts, and cannot give an opinion as to the guilt of the party charged with the offence. Yet the court intimate, that possibly a different rule may prevail in divorce cases. "The opinion of the witnesses might," said the judge, "greatly assist the chancellor in determining whether the offence was connived at, or whether there had been a condonation."² It is difficult, however, to perceive how the opinion of a witness can be any more relevant to the issue of connivance, or condonation, than to the issue of adultery itself. And there can be little doubt, that the true rule is to accept the opinions of witnesses in these cases as in any other, only when they testify as experts, and the like.

§ 287. In this class of suits it sometimes becomes necessary to introduce evidence of a nature somewhat indelicate; and, though its indelicacy cannot be pointed to as a ground of exclusion where the ends of justice will best be subserved by receiving it, yet each practitioner, treading along the line which separates the necessarily from the unnecessarily indelicate, will be careful to avoid stepping on the forbidden side. In a Florida case in which this principle was involved, it was said by Baltzell, C. J.: "Although courts may not refuse to consider details, however offensive and disgusting, when such become necessary in the course of investigation, yet they may and should always require the examination of witnesses to be conducted in a spirit of due delicacy, avoiding vulgar and obscene language."³

¹ 18 Ga. 696, some opinions of the witness were received, but not to the full extent indicated in the ecclesiastical practice.

² *Richards v. Richards*, 1 Wright, Pa. 225, 228.

³ *Cameron v. The State*, 14 Ala. 546, 551, opinion by Collier, C. J.

⁴ *Abernathy v. Abernathy*, 8 Fla. 243, 259.

§ 288. There are, pertaining to the evidence, various other points, of a sufficiently general nature to find place here; but, the reader having been already apprized, that the courts follow, in divorce causes, those general rules of evidence which guide them in other matters, except when the nature of the question requires a departure from them, it is deemed best this chapter should be here brought to a close.

CHAPTER XVI.

THE SUIT FOR NULLITY.

§ 289 [262.] SUITS for divorce from the bond of matrimony, for separation or divorce *a mensâ et thoro*, and for nullity of marriage, are governed substantially by principles of uniform applicability; and those principles have been and are to be unfolded in other connections. Some considerations, however, relating specially to this suit of nullity, will now be stated. Already it has been mentioned in these pages, that, in England, any person having an interest in a supposed marriage, may promote a suit to test its validity.¹ Whether the right in this country extends beyond the mere parties to the marriage appears to be an open question. And though a void marriage needs no sentence to make it null, practically a sentence of nullity in respect of such a marriage is often of great importance to the parties and to the community.²

§ 290 [263]. Besides the suit of nullity, mentioned in the last section, the English practice furnishes another proceeding, sometimes, yet rarely, resorted to in England,³ called a suit of jactitation of marriage; which suit accomplishes, in a certain aspect, substantially what is done by a suit of nullity. In it the man, for instance, for it may be carried on by either party, complains that the woman has maliciously and without authority boasted of being his wife, and prays to

¹ Vol. I. § 100.

² See *Wightman v. Wightman*, 4 Johns. Ch. 343, 346; *Patterson v. Gaines*, 6 How. U. S. 550, 592; *Martin v. Martin*, 22 Ala. 86; Vol. I. § 299, 300.

³ See 1 Lee, 16 note, 5 Eng. Ec. 289.

have her enjoined silence respecting such boasting. There are three defences to this suit; either, first, a denial of the boasting; or, secondly, an averment of a valid marriage subsisting; or, thirdly, an averment that the plaintiff permitted the defendant to assume the character of husband or wife. Where, and only where, this second defence is made, the suit becomes substantially one of nullity.¹ It is a proceeding, however, which appears to be unknown in the United States.

§ 291 [264]. In the United States, as already observed,² we have never had ecclesiastical courts; and, before other tribunals can take cognizance of causes ecclesiastical, they must receive statutory authority. Therefore a court of equity cannot entertain jurisdiction to avoid a marriage for impotence,³ or for any other like canonical defect. But in some cases of void marriages, our equity courts interfere under their ordinary powers. Thus they have inherent jurisdiction over all questions of fraud, mistake, duress, and lunacy; and, when a marriage is alleged to be void by reason of one of these impediments, they ordinarily entertain the suit for having it so declared. The reason is, that, although where, as in England, there are ecclesiastical tribunals, and perhaps where, in this country, another forum has been provided, equity does not entertain such suits, still the jurisdiction is inherent in the equity court; slumbering, when it slumbers, only out of deference to the other more appropriate tribunal.⁴ And it has been held, that, if a woman marries a man, the marriage being void because of his having a former wife

¹ *Bodkin v. Case*, Milward, 355; *Walton v. Rider*, 1 Lee, 16, 5 Eng. Ec. 289; *Hawke v. Corri*, 2 Hag. Con. 280.

² Vol. I. § 69, 71.

³ Vol. I. § 178, note.

⁴ *Perry v. Perry*, 2 Paige, 501; *Wightman v. Wightman*, 4 Johns. Ch. 343, 446; *Burtis v. Burtis*, Hopkins, 557; *Clark v. Field*, 13 Vt. 460; *Fornhill v. Murray*, 1 Bland, 479, 483; *Helms v. Franciscus*, 2 Bland, 544, 579; *Ferlat v. Gojon*, Hopkins, 478. And see *Almond v. Almond*, 4 Rand. 662; *Keyes v. Keyes*, 2 Fost. N. H. 553. Query, whether a court of equity can take jurisdiction to declare a marriage null on account of duress. See *Hulings v. Hulings*, 2 West. Law Jour. 131.

living, she can maintain her suit in equity for the rents, profits, and redelivery to her of the property whereof he obtained possession under the marriage; and that, in this suit, the court will incidentally declare the marriage void.¹

§ 292 [265]. The South Carolina Court of Chancery, however, refuses to entertain suits of nullity by reason of fraud, though the law of the State has provided no other jurisdiction. "The distinction," observed Dunkin, Ch., sitting in the Court of Errors, "between the authority to declare a marriage null and void, or to grant a divorce, has no sanction either in reason or authority. The same general principle which would authorize courts of equity to declare a contract void for want of consent, would require them to interfere in cases of fraud or misrepresentation, and declare the contract no longer obligatory on one party when the other had refused to perform the duties imposed by it. But no court, either in England or in the United States, has ever declared a marriage null and void in its inception, which did not at the same time assume, as a necessary incident, the authority to divorce the parties, in England *a mensâ et thoro*, in our sister States *a vinculo*."² The weight of this decision, as one of general law to guide the courts of other States, is greatly impaired by the fact of the judges having misapprehended the distinction elsewhere taken, and having erred in supposing there were no authorities contrary to their decision.

§ 293 [266]. The statutes of North Carolina give jurisdiction to certain courts "in all cases of applications for divorce;" and, after specifying certain sufficient offences, provide, that they may interfere where "any other just cause of divorce exists." And it is there held, as it is also under similar statutes elsewhere, that, though a sentence of nullity

¹ Young v. Naylor, 1 Hill, Ch. 383. See McDonald v. Fleming, 12 B. Monr. 285.

² Mattison v. Mattison, 1 Strob. Eq. 387, 392.

is not properly a divorce, yet, under this provision, jurisdiction may be taken whenever there has been a marriage *de facto*, to declare it void.¹ But in most of the States, statutes regulate this matter of jurisdiction in so clear terms as to leave no room for question.

§ 294 [267]. While, as already observed,² a suit for nullity follows substantially the same rules as a suit for divorce, yet, let us here add, it cuts deeper into the soil of consequences than the divorce suit; because the interests and rights of third persons are more affected by it. The children especially have their legitimacy or illegitimacy irrevocably established by this suit, not by a suit for divorce. Therefore it has been said to be a more highly privileged suit;³ while it excites, to even a greater degree, the vigilance and caution of the court.⁴ Yet where a case is sufficiently made out, the court has no discretion, but it must proceed to the sentence.⁵ It is of no avail, that the defendant is innocent of any intent to do wrong, or that the plaintiff is in fact the more guilty party.⁶ Yet these considerations may have weight with the judge when a discretionary power is invoked; therefore, in the ecclesiastical practice, a cause will not be rescinded after a hearing, to allow the plaintiff to prove the fact of the marriage, the nullity of which he sets up, if his conduct appears not to have been meritorious.⁷

¹ Johnson v. Kincade, 2 Ire. Eq. 470; Scroggins v. Scroggins, 3 Dev. 535; Ritter v. Ritter, 5 Blackf. 81; Hamaker v. Hamaker, 18 Ill. 137.

² Ante, § 289.

³ Butler v. Butler, Milward, 56, 62.

⁴ Harford v. Morris, 2 Hag. Con. 423, 4 Eng. Ec. 575; Wright v. Elwood, 1 Curt. Ec. 662, 666; Wright v. Ellwood, 2 Hag. Ec. 598, 4 Eng. Ec. 216; Legge v. Dumbleton, 9 Jur. 144.

⁵ Cobbe v. Garston, Milward, 529; Vol. I. § 136.

⁶ McCarthy v. De Craix, 2 Cl. & F. 568, note; Miles v. Chilton, 1 Robertson, 684. And see Vol. I. § 151, 214, 267, 294, 300, 320, 333.

⁷ Nokes v. Milward, 2 Add. Ec. 386, 2 Eng. Ec. 356, 365.

BOOK IV.

THE PLEADING AND ITS ACCOMPANIMENTS.

CHAPTER XVII.

THE PARTIES AND THE BRINGING OF THE SUIT.

SECT. 296. Introduction.

296-301. Who may be original Parties in Divorce and Nullity Suits.

302-308. The Matter as respects the Incapacity of a Party.

309, 310. Intervention of third Persons as Parties.

311-315. Bringing the Party into Court by Notice.

316-321. Cross-Suits, Suits pending, and taking Advantage of Matter transpired since Suit commenced.

§ 295. In this chapter the following matters will be brought under review: I. Who may be original Parties in a Divorce or Nullity Suit; II. The Matter as respects the Incapacity of one or both of the Parties; III. The Intervention of third Persons as Parties; IV. The Bringing of a Party into Court by Notice; V. Cross-Suits, Suits pending, and taking Advantage of Matter which has transpired since Suit commenced.

I. Who may be original Parties in Divorce and Nullity Suits.

§ 296. The plain proposition, which needs no elucidation, is, that the real or supposed husband or wife may be a party

plaintiff or defendant in every suit instituted to declare the marriage void, or to suspend its operation by a decree of divorce *a mensâ et thoro*, or to break the *vinculum* by reason of an offence against the marriage committed since its institution. And the proposition is true as a general one, that, in none of these suits, can any third persons stand in the place of the supposed husband or wife, so as to prevent the necessity of making him or her a party; and that, whoever else may be parties, both husband and wife must be such, the one as plaintiff and the other as defendant. And in some of our States, there are statutes which make this result always inevitable. Thus it has been held in Vermont, on a consideration of the statutory provisions, that it is fatal to a petition for divorce not to be signed by the libellant, and for the summons to be signed by a justice of the peace.¹ And in Massachusetts, where it was provided that the libel "shall be signed by the libellant, if of sound mind and of the age of legal consent to a marriage," the court held, that the libel must be subscribed by the party in person, and it was not sufficient subscribed by attorney, though under power conferred in a letter of attorney.² Plainly, therefore, the effect of this legislation is to cut off any common-law right, if such existed, in any third person, to bring the suit in such third person's own name.

§ 297. The practice in the ecclesiastical courts admits of great flexibility in the proceedings, as well in respect to the parties as in respect to other matters. Indeed, this practice

¹ Philbrick v. Philbrick, 27 Vt. 786.

² Gould v. Gould, 1 Met. 382; and see post, § 308. Before the statute was passed, in Willard v. Willard, 4 Mass. 506, the court sustained the libel signed by attorney, on proof that it was authorized by the libellant, "but cautioned the bar against such a practice in future." In Winslow v. Winslow, 7 Mass. 96, decided also previous to the statute, the libel was signed by a guardian who had been appointed by the judge of probate over the libellant as a spendthrift. "The court said it would be monstrous to dissolve a marriage upon such an application. It could not be known that the party ever gave his assent to the prosecution. If he is desirous of a divorce, and has sufficient ground to obtain one, he must file his libel in his own name."

is, as regards this particular quality of flexibility, and consequent aptitude to suit itself to the justice of varying cases, far superior to the practice either of the common law or the equity tribunals. According to the report of one case which occurred before an Ecclesiastical Court, the husband was in the East Indies, a minor, and the wife had committed adultery in England; upon which facts, the father employed counsel, who appeared before the court and "prayed the court to appoint the father of the husband his guardian, for the purpose of carrying on the suit on his behalf. He submitted, that, unless the court were to do so, great injury might be sustained by the husband, as the evidence of adultery might be lost." The court granted the prayer of the father, but directed that the case should not proceed to judgment until the son's approbation and confirmation of the proceedings should be obtained.¹

§ 298. We have mentioned already the point, that, in England, any person having an interest in a supposed marriage may maintain a suit, in his own name, to have its nullity declared.² For example, a father may maintain a suit to declare null the marriage of his daughter, even though she is of age.³ In like manner, a sister may proceed to have the marriage of her brother declared void as incestuous.⁴ It has been laid down in North Carolina, — the suit being in equity, — that, where a marriage is supposed to be void by reason of the insanity of a party, the guardian of such party may bring a bill to have it so declared, either in the guardian's name, or in the name of the lunatic by guardian, at his election. But the court seemed to deem the latter course the better one; "because," in the language of Ruffin, C. J., "upon suspending the commission [of guardianship] *pendente lite*, for the restoration of the party's

¹ *Morgan v. Morgan*, 2 Curt. Ec. 679.

² Vol. I. § 110; ante, § 289.

³ *Ray v. Sherwood*, 1 Curt. Ec. 193, 1 E. F. Moore, 353, 396, 400.

⁴ *Faremouth v. Watson*, 1 Phillim. 355.

reason, the case would be proceeded in without the necessity of a supplemental bill by the lunatic to procure the benefit of the proceedings as far as they had gone."¹

§ 299. Where the proceeding is in equity, and the plaintiff wife, who will be entitled if she prevails to a share in her husband's estate or to alimony out of it, suspects her husband to have conveyed away such estate or some portion of it to a third person to defraud her of her rights, she is at liberty to join such third person with her husband as defendant. But such third person cannot be the only defendant, the husband must be made a party defendant also; since the wife would have no right against the third person "until she had established her right against her husband, which she could not do without making him a defendant."² Therefore, where a bill was filed by the wife against the husband, for a separation from bed and board by reason of cruel treatment, and the assignees of the husband's life interest in the wife's real estate were made defendants, and the husband died before a decree, but the wife failed to make out a case which would have entitled her to a decree of separation if the husband had lived until the hearing, it was held, that the other defendants might have the bill dismissed, as to them, with cost.³ This is plain; and it seems scarcely less plain on principle, that the suit itself would abate with the death of the husband, wherefore no decree could be rendered against the third parties, even though the evidence against the husband was ample.

§ 300. If a wife has a separate estate, and the husband has squandered it, besides furnishing her ground for a divorce, and if the proceeding for a divorce is in equity, she may unite the divorce cause and the other claim for property

¹ *Crump v. Morgan*, 3 Ire. Eq. 91, 102.

² *Foster v. Hall*, 2 J. J. Mar. 546, 547; *McCrocklin v. McCrocklin*, 2 B. Monr. 370; *Kashaw v. Kashaw*, 3 Cal. 312. And see *Cropey v. McKinney*, 30 Barb. 47.

³ *Sackett v. Giles*, 3 Barb. Ch. 204.

in one bill. Said Handy, J., speaking of the latter claim: "It was certainly a right which she was entitled to enforce in some form. She could not assert it by an action at law, because she was incapable of suing him at law. Her remedy, then, for the recovery of her separate property was in equity, and no reason is perceived why she should not unite her several causes of complaint against her husband in one bill, instead of bringing two suits," &c. "It is justified by the equitable rule of preventing multiplicity of suits."¹

§ 301. It cannot be disguised that the foregoing views are inadequate to meet all the difficulties, which, under this head, will beset practitioners in the different States. Yet each practitioner must study the peculiar jurisprudence of his own State, study its statutes, and study the general course of the courts; this is required of him under all circumstances; and, if he has done this work well, he will have little need of any further help beyond what he will find in these sections. The same observation applies also to what will be brought out under the remaining sub-titles of this chapter.

II. *The Matter as respects the Incapacity of one or both of the Parties.*

§ 302. Whether a wife, proceeding for a divorce, is to bring the suit in her own name, or by her next friend, is a question which depends much upon the local jurisprudence of particular States. In some States, she sues alone; in other States, by her next friend. Likewise, when proceeded against, she defends alone in some States; in other States, by her next friend. Nothing more will be attempted here than to refer to various authorities on this subject.² In the

¹ *Armstrong v. Armstrong*, 32 Missis. 279, 292.

² *Kenley v. Kenley*, 2 How. Missis. 751; *Hunt v. Booth*, Freeman, Missis. 215; *Richardson v. Richardson*, 4 Port. 467; *Schenck v. Ellingwood*, 3 Edw. Ch. 175;

English Ecclesiastical Courts, she sues alone, if of full age and of sound mind, not by her next friend.¹

§ 303. The general principle of law is familiar, that a person under age — in other words, an infant — can appear in court only by next friend or guardian.² And in New York it was held by Chancellor Walworth, that, though in a suit for divorce from the bond of matrimony the wife, whether plaintiff or defendant, appears in her own name alone, yet, if she is a minor, she must, like all other minors, sue or defend by guardian or next friend. Therefore, where an infant wife had put in her answer to her husband's bill for divorce from the bond of matrimony by her solicitor, the proceeding was set aside upon her application, and she was permitted to put in a new answer.³ The court of Maine having afterward occasion to consider this question decided, that, contrary to the conclusion to which the New York tribunal had arrived, an infant wife, suing her husband for divorce, might bring the libel in her own name, without the intervention of a next friend. The judges deemed, that this New York decision had proceeded upon some peculiarity in the statutes and rules of practice prevailing there, and not upon principles universally applicable in such a case. Still this Maine adjudication appears to have rested somewhat upon the local statutes of the State.⁴ In such cases, the English Ecclesiastical Court seems to have required a guardian *ad litem*.⁵

§ 304. The questions discussed in the last two sections

Shore v. Shore, 2 Sandf. 715; *Meldora v. Meldora*, 4 Sandf. 721; *Knight v. Knight*, 2 Hayw. 101; *Ward v. Ward*, 2 Dev. Ch. 553; *Jelineau v. Jelineau*, 2 Des. Eq. 45; *Prather v. Prather*, 4 Des. Eq. 33; *Amos v. Amos*, 3 Green Ch. 171; *Kirby v. Kirby*, 1 Paige, 261; *Wood v. Wood*, 2 Paige, 108, 454, 8 Wend. 357; *Lawrence v. Lawrence*, 3 Paige, 267; *Rose v. Rose*, 11 Paige, 166; *Thomas v. Thomas*, 18 Barb. 149; *Peltier v. Peltier*, Harring. Mich. 19.

¹ *Herbert v. Herbert*, 2 Hag. Con. 263, 269, 4 Eng. Ec. 534, 538; *Coots Ec. Pract.* 320.

² *Schemerhorn v. Jenkins*, 7 Johns. 373; *Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 552.

³ *Wood v. Wood*, 2 Paige, 108.

⁴ *Jones v. Jones*, 18 Maine, 308.

⁵ *Barham v. Barham*, 1 Hag. Con. 5.

are so technical in their nature, and depend so much upon mere rule, and so little on general principle, that we shall find very little scope for the exercise of unfettered legal reason upon the subject. There is no general principle of law — nothing except technical rule — which should stand in the way of a wife of full age proceeding against her husband in her own name alone. Thus stands the matter freed from fetters. Whether a judge will feel bound to put the fetters on is a question which must depend upon special considerations, not necessary to be discussed here. There is, in reason, some propriety in requiring an infant to appear in court by guardian or next friend, and not in person; because the infant is deemed, in law, not fully competent to manage his own business. But surely, if the infant has been permitted by the law to marry, and to take upon him or her the full responsibilities of husband or wife, reason would seem to dictate, that mere infancy should no more preclude such a person from seeking a divorce, or defending a divorce suit, without a next friend, than it did the courtship and marriage without such friend. If the law would be consistent, it should make an exception here to its general rule, which forbids infants to carry on and defend suits in their own names alone.

§ 305. When one of the parties is of unsound mind, the question as to the proceeding becomes a complicated one of law and of practice. Suppose a man commits a crime in his sane state, and then becomes insane, it is a perfectly well established proposition in the criminal law, that he cannot, during the continuance of the insanity, be tried and convicted for the crime. And in a late English case, the court refused to allow a husband to proceed against his wife, who was a lunatic, for a dissolution of their marriage on the ground of adultery alleged to have been committed by her previous to her lunacy. "This case," said the Judge Ordinary, Cresswell, "is very different from one where a lunatic is the petitioner.¹ . . . The question is, whether the petitioner should

¹ The counsel had referred to *Portsmouth v. Portsmouth*, 1 Hag. Ec. 355; Par-

be allowed to proceed under the circumstances. It will be a hard case upon the petitioner if he is not allowed to do so. But it will also be a hard case upon the respondent, who is not able to take part in the proceedings, if he is allowed. I have made inquiry if there had been any case in the Ecclesiastical Courts under similar circumstances, which could be an authority for me in giving my decision. I am told by Dr. Bayford, that there was one which he himself argued in the Court of Arches. It is not reported; but he recollects that the court decided that a suit for divorce *a mensâ et thoro* could not be maintained against a lunatic. I cannot allow the petitioner to proceed in the present suit;" which, the reader remembers, was a suit for the dissolution of the marriage.¹ We have already seen,² that the same rule as to the intent, whereby we determine whether an act of carnal intercourse is indictable or not, applies in divorce suits, when we inquire whether it will constitute foundation for the divorce. This decision of the English tribunal seems to have drawn within the circle of the divorce law still another principle from our criminal jurisprudence.

§ 306. At the same time, if one in a lucid state has committed a breach of matrimonial duty, and the breach is not known to the other party until the delinquent one becomes insane, there would seem to be no special reason why, under proper safeguards to prevent injustice from being done to a person who cannot exercise any discretion in the defence, the suit should not be permitted to proceed. If a person becomes indebted to another in a sum of money, and then becomes insane, the creditor is permitted to collect his money by suit; and the interests of a party in a marriage would seem to be of as much value as those of a creditor, unless the sum was very large. Still, if a husband, finding his wife insane, should proceed against her to obtain a divorce for a cause which he knew as much about before she became in-

nell v. Parnell, 2 Hag. Con. 169, 2 Phillim. 158; and, for analogies, to Barham v. Barham, 1 Hag. Con. 5; Beauraine v. Beauraine, 1 Hag. Con. 498.

¹ Bawden v. Bawden, 2 Swab. & T. 417, 418, 419.

² Vol I, § 709.

sane as he did afterward, he should not in reason be permitted to go on.¹

§ 307. When we come to inquire whether an insane person can maintain a suit for divorce, we are met by still other difficulties of principle. Where the suit is to obtain a mere separation *a mensâ et thoro*, there is no reason why it should not be allowed, and that it is allowable is established law in England.² In like manner, if an insane person is entrapped into the form of marriage with another person, reason would seem to indicate that the guardian or committee of such insane person should be permitted, during the continuance of the insanity, to institute and carry on a proceeding to have the formal marriage declared void; and that this may be done, seems to be established law with us.³ In like manner, probably the suit for nullity may, in these and all similar cases, be carried on against the insane party by the sane one; though, in such cases, if the same plaintiff had practised a fraud upon the insane defendant, it would hardly accord with correct principle to permit the suit to proceed.⁴ But when the object of the proceeding is to obtain a divorce from the bond of matrimony for a cause which occurred subsequently to the marriage, and the insane person knew of the cause before the insanity came on, yet did not choose to proceed by reason of the cause, it is not apparent how the committee of the insane person can choose to dissolve a marriage which the ward, in his sound mind, chose to let

¹ See *Broadstreet v. Broadstreet*, 7 Mass. 474, and *Mansfield v. Mansfield*, 13 Mass. 412, where the insanity of the defendant was deemed to be no obstacle to the suit for dissolving the marriage by reason of adultery. This might possibly have been in consequence of the provisions of some statute; but I think not, as I find none. A provision relating to the defence, corresponding to the one cited ante, § 296, and post, § 308, first appeared in the Revised Statutes in 1836. See Com. Rep. pt. 2, p. 121. And see *Montgomery v. Montgomery*, 3 Barb. Ch. 132; post, § 308.

² Ante, § 305 and the cases there cited.

³ Ante, § 298; *Crump v. Morgan*, 3 Ire. Eq. 91; *Brown v. Westbrook*, 27 Ga. 102. And see *Clement v. Mattison*, 3 Rich. 93.

⁴ *Montgomery v. Montgomery*, 3 Barb. Ch. 132; *Johnson v. Kincade*, 2 Ire. Eq. 470.

stand ; for divorce is one of those rights which the party can exercise or forbear to exercise as he pleases. If the breach occurred or was first known after the insanity came on, the guardian might well presume that the ward would desire the legal consequence to follow.

§ 308. It is hardly necessary to say, that, in these cases of insanity, the insane person cannot appear to prosecute or defend in his own name ; it must be by guardian, guardian *ad litem*, or committee. How precisely this shall be done, must depend somewhat upon local statutes and jurisprudence ; and, in a general way, the reader will derive help from a consultation of the cases cited to the accompanying sections.¹ In one of the early Massachusetts cases, "Wilde," says the report, "suggested to the court that the [defendant] wife was insane at the time mentioned in the libel, and that she had continued so to this time ; and, expressing some doubt as to the mode of his appearing in her behalf in the cause, the court said he should be admitted to plead in her name. He pleaded that she was not guilty of the crime alleged ; and, the insanity being proved to the satisfaction of the court, the libel was dismissed."² The present statute of Massachusetts provides, that "every libel shall be signed by the libellant, if of sound mind and of legal age to consent to marriage ; otherwise it may be signed by his or her guardian, or by any person admitted by the court to prosecute the same as next friend of the libellant."³

¹ Ante, § 298, 305-307. And see (not a divorce case) *Aldridge v. Montgomery*, 9 Ind. 302 ; *Shelf. Mar. & Div.* 200 ; *Coots Ec. Pract.* 314 ; *Carpenter v. Carpenter*, Milward, 159, 161.

² *Broadstreet v. Broadstreet*, 7 Mass. 474. But see *Mansfield v. Mansfield*, 13 Mass. 412, in which case, "it being suggested by a friend of the court, that since the commission of the crime the husband had become insane, the court ordered the default to be set aside, and the libel to be continued ; observing to the proctor for the libellant, that, if so advised, she might, during the vacation, procure the appointment of a guardian to her husband in the Probate Court, and, upon the appearance of such guardian in the suit, further proceedings might be had ; and, if sufficient cause appeared, a divorce might be decreed."

³ Gen. Stats. c. 107, § 16. See ante, § 296 and note.

III. *The Intervention of Third Persons as Parties.*

§ 309. It is established practice in the ecclesiastical courts, that, though a suit has been commenced between two principal parties, if any third person has or thinks he has an interest in the suit, he may apply to the court to intervene,—in other words, to become a party for the protection of his interest,—and, if his interest is admitted or proved, his prayer will be granted;¹ “as, for instance,” says Law, “in causes of matrimony. . . . If a man takes out proceedings against a woman in a cause matrimonial, and the woman has either solemnized or contracted a marriage with another man, such other man, or third party, may, if he pleases, interpose in the said suit, to protect his own rights, in any part of the proceedings, even after the conclusion. It matters not whether he appears in aid, or in opposition, to the woman. Neither is the case altered by any previous notice he might have of the pending suit, and of the plaintiff’s having proceeded to proof.”² There are various nice questions as to the practice in intervention, as to who may intervene, and the like; but, should such a question become important, the reader can easily look it up in the books of the ecclesiastical law.³

§ 310. To what extent this practice of intervention may be resorted to in this country is a matter which does not

¹ Law’s Forms, 70; Shelf. Mar. & Div. 579; Donegal v. Chichester, 3 Phillim. 586; Schoolmasters of Scotland v. Fraser, 2 Hag. Ec. 613; Wood v. Medley, 1 Hag. Ec. 645.

² Law’s Forms, 71.

³ See, besides the authorities already referred to in this section, Ray v. Sherwood, 1 Curt. Ec. 173, 1 E. F. Moore, 353; Montague v. Montague, 2 Add. Ec. 372; Faremouth v. Watson, 1 Phillim. 355; Hughes v. Turner, 4 Hag. Ec. 30; Kipping v. Ash, 1 Robertson, 270; Pertreis v. Tondear, 1 Hag. Con. 136; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 137, note; Clement v. Rhodes, 3 Add. Ec. 37; Braham v. Burchell, 3 Add. Ec. 243, 256; Brotherton v. Hellier, 1 Lee, 599; Wright v. Rutherford, 2 Lee, 266; Shelf. Mar. & Div. 487.

seem clear on the authorities. In a Vermont case it was adjudged, that, on a petition for a divorce, where real estate held by the husband in right of his wife had been levied on by the husband's creditors, those creditors could not appear and resist the petition on a suggestion of collusion between the parties, and an attempt by them to defeat their rights. It was very properly intimated, however, that the legal adviser of the creditors, or any other person, might, as *amicus curiæ*, make to the court a suggestion of collusion.¹ This is plainly a case in which, if the English ecclesiastical practice had been followed, the intervention would have been permitted. And the writer can only express the hope, that a practice so beneficial, and so entirely in accord with the general policy of our divorce laws, will find better favor in the American tribunals hereafter. The judge, we have seen,² is in these cases under obligation to protect the interests of the public, — Why, then, should not persons who have special interests be permitted to protect themselves?

IV. *The Bringing of a Party into Court by Notice.*

§ 311. It is a principle of natural justice which is acted upon by every court, that no person should be injured or disturbed in any of his interests, by any decree or other proceeding, without being notified of the proceeding, and permitted to come in and object. This principle guides the courts and the legislatures in all our States, in divorce matters. But to minutely trace the statutory laws of the several States on the subject, or even the decisions of the courts, depending as they do on these particular enactments, would be unwise; yet a reference, in a note, to some of the cases may be found convenient.³ If there has been no service of

¹ *Stearns v. Stearns*, 10 Vt. 540.

² *Ante*, § 236.

³ *Lyon v. Lyon*, 21 Conn. 185; *Smith v. Smith*, 20 Misso. 166; *Woods v. Woods*, 2 Curt. Ec. 516; *Floyd v. Black*, Litt. Sel. Cas. 11; *Smith v. Smith*, 6 Mass. 36; *McRae v. Mattoon*, 13 Pick. 53; *Farwell v. Smith*, 12 Pick. 93; *Hobart*

process, it is error to render judgment.¹ In New York, it was held by the former chancery court, that personal service of a subpoena in a divorce cause, upon a defendant confined in the state prison, was regular.² It was held, under the provisions of the Arkansas statute, that a service of a subpoena to answer to a bill for divorce, by simply reading the subpoena to the defendant, is not sufficient.³ In Massachusetts, a libel was held not to be sufficiently served by leaving an attested copy of it at the defendant's usual place of abode, when it appeared that the defendant was not in the house at the time, and had not been within the county since the service.⁴ And plainly, whatever be the general form of words used in a statute, if the respondent is living within the jurisdiction of the court, and actual personal notice can be conveyed to him, the judge should not proceed to the hearing in a defaulted case until he is made fully satisfied, that the party against whom the decree is to be pronounced, has received notice in fact, and not merely in law.⁵

§ 312. In Delaware, on a petition for divorce, it appeared that the defendant husband concealed himself from the officer

v. Hilliard, 11 Pick. 143; *Brown v. Brown*, 15 Mass. 389; *Hotchkish's case*, 1 Root, 355; *Harter v. Harter*, 5 Ohio, 318.

¹ *Townsend v. Townsend*, 21 Ill. 540. See *Smith v. Smith*, 20 Misso. 166.

² *Phelps v. Phelps*, 7 Paige, 150.

³ *Welch v. Welch*, 16 Ark. 527. And see *Smith v. Smith*, 9 Mass. 422.

⁴ *Randall v. Randall*, 7 Mass. 502.

⁵ And see *Labotiere v. Labotiere*, 8 Mass. 383. There is a New York case which was heard before the Vice-Chancellor, wherein it was observed, that thereafter evidence would be required, on a reference to the Master for proofs, where there was a default of the actual service of the process upon the defendant, within the jurisdiction of the court. And the judge mentioned the fact of "a case lately before him having progressed very far to a decree, when it was found out that service of subpoena had been effected by the husband himself upon the wife in the city of New Orleans. He also said that he should require the production of the original affidavit of service of subpoena or of a certified copy, in order to see that it was sufficiently positive as to the identity of the party on whom the service was made, as, in one instance which had come to his knowledge, the wife had been personated for the purpose of such a service, and a decree obtained against her entirely by surprise." *Schetzler v. Schetzler*, 2 Edw. Ch. 584. See also *Alexander v. Alexander*, 2 Swab. & T. 95.

charged with serving the notice upon him, for which reason he could not be found; and that he was prosecuting a suit against the administrator of the wife's father for the recovery of her share of the estate. The court thereupon ordered a stay of proceedings in this suit, until he should appear and answer to the suit for divorce. "He asks justice," said the judge, "and he must not refuse to do justice."¹

§ 313. The rule that a general appearance by a defendant cures any imperfection in the notice, is familiar to all practitioners. So also it is familiar, that, in some circumstances, and to a certain extent, it precludes objection to the jurisdiction of the court over the party. In Illinois it was held, that, in an action for divorce in the circuit court, an objection to the tribunal for the particular county taking the jurisdiction came too late after trial and verdict. "The circuit courts," said Breese, J., "have general jurisdiction of the subject of divorces, and the defendant in this case voluntarily submitted to the jurisdiction over his person. The objection, being of a dilatory character, should have been made before trial, by motion or by plea in abatement; answering to the merits waives the objection."²

§ 314. But the matter of, perhaps, the greater interest in these cases is the notice to defendants who are absent from the State. In most, if not all the States, there is provision made by statute for such notice; and a single reference to the leading decisions will satisfy the reader as to most points.³ On a question, not of divorce, but one arising

¹ *Baldwin v. Baldwin*, 2 Harring. Del. 196. And see *Cooke v. Cooke*, 2 Swab. & T. 50.

² *Peeples v. Peeples*, 19 Ill. 269, 271.

³ *Homston v. Homston*, 3 Mass. 159; *Choate v. Choate*, 3 Mass. 391; *Anonymous*, 5 Mass. 197; *Smith v. Smith*, 6 Mass. 36; *Labotiere v. Labotiere*, 8 Mass. 383; *Plummer v. Plummer*, 37 Missis. 185; *Ditson v. Ditson*, 4 R. I. 87; *Sweet v. Avaunt*, 2 Bay, 492; *Crabb v. Atwood*, 10 Ind. 331; *Green v. Green*, 7 Ind. 118; *Meyar v. Meyar*, 3 Met. Ky. 298; *Harrison v. Harrison*, 19 Ala. 499; *Smith v. Smith*, 4 Greene, Iowa, 266; *Pinkney v. Pinkney*, 4 Greene, Iowa, 324; *God-*

under a tax title, it was held, that, where notice of a public sale is required by statute to be given thirty days previous to the sale, and there is no direction that the last publication shall be thirty days before the sale, the direction is sufficiently complied with if the commencement of the notice is thirty days before sale.¹ In the Supreme Court of the United States it was adjudged, that, to constitute a valid sale of property for non-payment of taxes, under a statute directing public notice of the time and place of the sale to be given by advertisement in some newspaper "once in each week for at least twelve successive weeks," a period of twelve full weeks, or eighty-four days, must have elapsed between the first advertised notice of the sale and the day on which it was made.² Where, in Maine, the law required the notice of a sale to be published in the newspaper of the public printer of the State, and before the last publication the paper had ceased to be the State paper, the notice was held to be insufficient.³

§ 315. In these libels for divorce, the order of notice which is made by the court must be strictly followed.⁴ And where the libellant stated in the libel her maiden name to have been Launders, and in the copy published the name was Saunders, the notice was held to be insufficient by reason of the variance.⁵ Where the order of the court was to give notice by publishing, &c., "three weeks successively," in a newspaper, the court deemed the order complied with where there had not been an interval of a week between either the first and second, or second and third, publications. "The publication has been made," said the judge, "in three successive weeks, which is sufficient."⁶

frey v. Godfrey, 27 Ga. 466; Anonymous, 27 Maine, 563; Anonymous, 5 Mass. 197; Mace v. Mace, 7 Mass. 212; Schnauffer v. Schnauffer, 4 La. An. 355.

¹ Colman v. Anderson, 10 Mass. 105.

² Early v. Doe, 16 How. U. S. 610. ³ Bussey v. Leavitt, 3 Fairf. 378.

⁴ Smith v. Smith, 4 Greene, Iowa, 266.

⁵ Jenne v. Jenne, 7 Mass. 94.

⁶ Bachelor v. Bachelor, 1 Mass. 256. See also Gary v. May, 16 Ohio, 66.

V. *Cross-Suits, Suits pending, and taking Advantage of Matter which has transpired since Suit commenced.*

§ 316. Allusion has been made more than once in these volumes to the flexible nature of the proceedings in the Ecclesiastical Courts.¹ In these courts, when a married party was proceeded against for a divorce *a mensâ et thoro*, or for nullity of the marriage, or for restitution of conjugal rights, such party could not only defend the suit by showing a competent wrong, or the like, in the other party; but, prevailing, could have the proper sentence rendered in his favor, as though he were the original plaintiff.² In like manner, if a husband, for instance, were proceeding against his wife on the ground of her adultery, and a new fact of adultery should come to his knowledge, committed since the suit was commenced, he might plead this fresh adultery in a supplemental allegation, even though publication, as to the original matter, had passed; and, proving the supplemental matter, a divorce might be granted him founded upon it.³

§ 317. But the practice of our common law and equity courts accommodates itself less nicely to the justice and the equity of these cases. At the same time, there are American decisions in which this English flexibility is almost attained; while, in other cases, the unyielding rigidity of the old common law seems to have been fully preserved. In New York, the following case arose: a wife brought her bill for divorce *a mensâ* against her husband on the ground of cruelty, and he, besides denying the cruelty, alleged, that, at the time of the marriage between the parties, she was the wife of another man who was still living, and prayed for a sentence of

¹ Vol. I. § 110; ante, § 297.

² And see *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158; *Dysart v. Dysart*, 1 Robertson, 106; *Clows v. Clows*, 3 Curt. Ec. 185, 194.

³ *Middleton v. Middleton*, 2 Hag. Ec. Supp. 134, 4 Eng. Ec. 299; *Webb v. Webb*, 1 Hag. Ec. 349, 3 Eng. Ec. 152.

nullity of marriage in his favor. But as the evidence did not sustain his allegation, the court left the point undecided, whether or not he could proceed in this way.¹ In another New York case, a wife having brought against her husband a bill for divorce on the ground of his cruelty, he answered the bill by setting up her cruelty, and prayed for the affirmative relief of a divorce, and it was granted him.² But the New York Code provides, that there may be given to the defendant "any affirmative relief to which he may be entitled."

§ 318. The practice of bringing a cross-bill by the defendant against the plaintiff, to aid the defence and likewise obtain affirmative relief, may be resorted to in these divorce cases as well as in any other. This way is open to a defendant, equally whether the proceeding is by bill in equity, by libel corresponding to the ecclesiastical libel, or by a statutory complaint; and this is a matter which needs no particular illustration.³ There is an Indiana statute which provides, that "the defendant may, in addition to his or her answer, file a cross-petition for divorce, and the court shall, in such case, decree the divorce, if any, in favor of the party legally entitled to the same." And where a husband had brought his petition, and the wife had filed her cross-petition under this statute, then the husband had caused his petition to be dismissed, the court held, that the whole case was ended, and the wife could not proceed further with her cross-petition. There can be little doubt that this is so on principle; and, on the other hand, there can be as little doubt on principle, that, where a defendant has thus obtained a status in court entitling to affirmative relief, the judge should not permit the plaintiff to dismiss the suit, and thus defeat the right. But an observation made by the

¹ *Linden v. Linden*, 36 Barb. 61. See *Zule v. Zule*, Saxton, 96; *Bogges v. Bogges*, 4 Dana, 307.

² *McNamara v. McNamara*, 2 Hilton, 547, 9 Abbott's Pr. 18.

³ *McCafferty v. McCafferty*, 8 Blackf. 218; *Russell v. Russell*, 1 Smith, Ind. 356, 1 Ind. 510; *Stafford v. Stafford*, 9 Ind. 162; *Bogges v. Bogges*, 4 Dana, 307; *Birkby v. Birkby*, 15 Ill. 120.

judge while ruling the wife out of court is worthy of special note. He said: "It is time that legal strictness was adhered to in deciding divorce cases. The facility with which divorces have been granted, has proved a curse to the social state. It has proved an incentive to domestic discord, and tended greatly and injuriously to blunt the sense of matrimonial obligations and duties, and weaken the ties which should bind together husband and wife, and children—in short, families—and, in so doing, to demoralize and disorganize society."¹ It seems to the writer that the true view to be taken of the matter thus mentioned is this: if the statutory law of the State authorizes divorce for too many causes, or for frivolous causes, the legislative power should be petitioned to amend it. Yet while it stands, the courts should carry out its provisions in their true spirit, neither too strictly, nor too loosely. But the procedure is to be distinguished from the law. Every judge should esteem it his duty and his pleasure, whatever he thinks of the law, to hold the procedure as free as possible from technical kink and from every manner of obstruction; so that litigants can bring, with the least practicable expense and vexation, the questions of law and of fact to be tried, before the judge and the jury.

§ 319. It has been in some tribunals held, that, if at the time of bringing the suit for divorce the cause of divorce is not fully matured, and therefore the party is not entitled to the remedy he seeks, the defect cannot be supplied by a supplemental bill filed in the original suit, alleging facts which transpired since the original suit was commenced.² On the other hand, other courts have permitted this to be done; that is, have permitted the plaintiff to proceed on a supplemental bill filed in the original cause, and alleging facts which transpired after the filing of the original bill, and

¹ *Stoner v. Stoner*, 9 Ind. 505, 506.

² *Milner v. Milner*, 2 Edw. Ch. 114; *Hill v. Hill*, 10 Ala. 527.

making those facts the ground of divorce.¹ But the authorities concur in the proposition, that, without a supplemental or an amended bill, the plaintiff cannot rely upon such subsequent matter.²

§ 320. How far the pendency of a libel for divorce may be shown in abatement of a subsequent libel, is a matter about which judicial decision has not much enlightened us. According to a Maryland case, the fact that the complainant had filed a bill in the equity side of the county court, for divorce and alimony, before bringing her bill in the court of chancery for a provision for her maintenance out of her husband's estate, wherein she asked no divorce, is an insuperable objection to her obtaining relief in the latter suit.³ In Massachusetts, simple desertion, without any time appended, was by statute made cause of divorce from bed and board. Afterward it was enacted, that desertion continued five years should be ground of divorce from the bond of matrimony. A party, having a suit pending for the limited divorce by reason of the simple desertion, brought, after the later statute was enacted, suit for the full divorce; and it was held, that the pendency of the former suit could not well be pleaded in abatement of the subsequent one. "The reason," said Shaw, C. J., "why a second suit cannot be commenced for the same cause, pending a former, is, that it is unnecessary, inasmuch as the party prosecuting may have the same remedy under the first, as he could obtain by prosecuting another," — a reason which, not existing in this case, could not operate to abate this suit.⁴

§ 321. In an English case before the new matrimonial court, a wife, having brought her petition for a judicial separation by reason of the husband's cruelty, discovered, that,

¹ *Butler v. Butler*, 4 Litt. 201; *Logan v. Logan*, 2 B. Monr. 142; *McCrocklin v. McCrocklin*, 2 B. Monr. 370; *Feigley v. Feigley*, 7 Md. 537.

² *Butler v. Butler*, *supra*; *Feigley v. Feigley*, *supra*; *Marsh v. Marsh*, 2 Beasley, 281; *Ferrier v. Ferrier*, 4 Edw. Ch. 296.

³ *Dunnoch v. Dunnoch*, 3 Md. Ch. 140.

⁴ *Stevens v. Stevens*, 1 Met. 279, 280.

unknown to her at the time of bringing the suit, the husband had committed adultery also. She thereupon asked leave to withdraw the petition for judicial separation, and file one for the full divorce by reason of the two offences combined. The Judge Ordinary asked, whether the wife's proctor had received her costs in the former suit; and, being answered in the affirmative, said: "That being so, I will grant the application."¹

¹ *Ashley v. Ashley*, 2 Swab. & T. 388, 389. And see *Turner v. Turner*, 2 Swab. & T. 426; *Alexander v. Alexander*, 2 Swab. & T. 385.

CHAPTER XVIII.

THE PLEADINGS IN COURT.

SECT. 322. Introduction.

323-325. General Views of the Libel.

326-344. What particular Allegations the Libel should contain.

345-349. The Pleadings subsequent to the Libel.

§ 322. UNDER the several titles of Adultery, Cruelty, and the like, those special matters which concern the method in which the particular offence shall be set out in the allegation, and other things of this sort, will be considered. In this chapter, it is proposed to bring under our review only such things as pertain to the cause irrespective of the particular ground on which the sentence of divorce or of nullity is prayed. We shall divide what is to be said as follows : I. General Views of the Libel ; II. What particular Allegations the Libel should contain ; III. The Pleadings subsequent to the Libel.

I. *General Views of the Libel.*

§ 323. The first observation to be made is, that, in considering the nature of the libel, we must not be much led by any teachings derived from the practice of the English Ecclesiastical Courts. We have already seen,¹ that, in the practice of those courts, the libel serves, in effect, what with us may be deemed two distinct purposes ; the one is, that of allegation proper ; the other, that of interrogatory, for the examination of all the witnesses, and for the personal examination of the

¹ Ante, § 217, 221.

defendant, as to the particular facts of the case. The English allegation, as it used to be seen in the practice of the Ecclesiastical Courts, is not indeed in the form of questions, there is no need it should be; because, as we have seen,¹ the examiner takes the libel, and himself puts the questions based upon what he finds therein stated.

§ 324. Ayliffe says: "A libel ought to be short, and not verbose, because the law abhors a prolixity of words."² Yet when a libel contains, in reality, almost a full statement of the evidence, as well as of the legal facts on which the relief is sought, how can it be short? The English ecclesiastical libel searches the conscience of the respondent, searches the memories of all the witnesses, and almost palavers with the judge,—How, then, can it be short? In order to serve its interrogative ends, it is set out in articles, which are numbered; but an American libel for divorce need not be in numbered articles, it is not interrogative in its nature. An American libel may be short; and it would be very injudicious for an American practitioner to present to the court, under any circumstances, a libel for divorce drawn upon the English ecclesiastical model.

§ 325. Where the proceeding, with us, is in equity, the bill is framed after the general pattern of other bills in equity. Where it is not in equity, the libel contains a statement of the legal facts more nearly after the manner of common-law pleadings. Yet the course of practice in these cases is not quite uniform in all the States, and in many of them it is not perhaps well defined. Let us look, in our next sub-title, at some particular propositions.

II. *What particular Allegations the Libel should contain.*

§ 326. The first inquiry under this head is, to what extent different matrimonial offences may be joined in one libel.

¹ Ante, § 221.

² Ayl. Parer. 346.

The doctrine is clear, the practice is uniform, that, if several distinct matrimonial wrongs, — as, for example, adultery and cruelty, — are each made cause for the same kind of divorce, whether it be from bed and board, or from the bond of matrimony, they may be complained of in one libel, and the libellant will take his divorce for whichever he can prove, or for both. This is universal practice, in England and in the United States.¹ In one case, a bill praying for a divorce from the bond of matrimony alleged the three several causes of cruelty, desertion, and adultery; and the judge observed, that this was no objection to it, and added: "The title to the relief prayed is the same whether one or the other of the several alleged grounds be proved. It is well settled that the plaintiff may aver facts of a different nature, which will equally support his application."²

§ 327. But where adultery and cruelty, for example, are grounds for different kinds of divorce, — as, where the adultery authorizes a divorce from the bond of matrimony, and cruelty, from bed and board, — the two, if the proceeding is in equity, cannot be joined in one bill.³ So it has been decided in New York and in New Jersey; but perhaps the decisions in these States may be found to rest in reasons which in some of the other States do not exist. Said Chancellor Kent, giving an opinion in New York: "The charges of adultery and of cruel usage are not only distinct and unconnected charges, but they lead to distinct issues and decrees. An answer to a charge of adultery may be without oath, but an answer to a charge of cruel usage must be upon oath. The charges, therefore, necessarily require separate answers; and, if the charge of adultery be denied, a feigned issue must be awarded, which need not be the case on denial

¹ And see *Stokes v. Stokes*, 1 Miss. 320; *Morris v. Morris*, 20 Ala. 168.

² *Quarles v. Quarles*, 19 Ala. 363, 366, opinion by Chilton, J.

³ *Mulock v. Mulock*, 1 Edw. Ch. 14; *Rose v. Rose*, 11 Paige, 166; *Beach v. Beach*, 11 Paige, 161; *Smith v. Smith*, 4 Paige, 92; *Decamp v. Decamp*, 1 Green, Ch. 294; *Pomeroy v. Pomeroy*, 1 Johns. Ch. 606; *Snover v. Snover*, 2 Stockton, 261.

of the charge of cruel usage, but the latter may be tried upon depositions, according to the ordinary course of the court. If the adultery be confessed, or if the bill, as to that charge, be taken *pro confesso*, still there must be a reference to a master, to take and report proof of the charge; and the cause must be brought regularly to a hearing upon such proof. But if the defendant confesses the other charge, or if he suffers the bill to be taken *pro confesso*, the admission is conclusive, and puts an end to the controversy. The decrees in the two cases are essentially different. In the one, it is an absolute divorce, with a disability to the defendant to marry again. In the other, the divorce is only *a mensâ et thoro*, and may be for life or for a limited time, at the discretion of the court." And there were still other differences in the procedure, which he pointed out.¹ In Massachusetts, where most of these reasons do not exist, and the proceeding is not in equity, neither is it purely at common law, it is always customary to unite the two charges of cruelty and adultery in one libel, though one of them furnishes ground for divorce from the bond of matrimony, and the other, for divorce only from bed and board. The court will decree the one or the other divorce, according as the evidence produced may require.²

§ 328. The rule in equity proceedings is familiar, that, under the general prayer for relief, suppose there is also a specific prayer, the court will grant such particular relief as the case stated in the bill and supported by the proofs may require.³ And on this principle, if the particular prayer is for one form of divorce, and the proven facts show a right to the other form, and the allegations in the bill afford foundation for this other form, the latter may be granted. So it would seem on principle, yet the books present us scarcely any specific authority on this point.⁴ Where there is no general

¹ Johnson v. Johnson, 6 Johns. Ch. 163.

² Young v. Young, 4 Mass. 430.

³ Tayloe v. Merchants Fire Insurance Co. 9 How. U. S. 390.

⁴ The reader may consult, Klingenberg v. Klingenberg, 6 S. & R. 187;

prayer, but a specific one, the particular relief prayed for will be granted, or not any thing.¹ Yet in an English case before the new court, the prayer of the plaintiff wife was for a dissolution of the marriage by reason of adultery and desertion; she proved adultery only, which entitled her merely to a judicial separation; and, notwithstanding the prayer, the court held, that, as she had brought her case within the law authorizing the latter remedy, it might be granted.²

§ 329. The libel must set out a sufficient cause of divorce, else the court cannot entertain it.³ Where it does not, if a jury find a verdict upon it, no judgment can be rendered thereon.⁴ And the cause must exist at the time the libel is filed.⁵ Where the cause is one which, by law, must be continuing then, the date of the libel must not be anterior to the time of the filing. The judge suggested, that the better course in such a case would be to attach no date to the libel, "leaving the date of the filing to be regarded as the date of the petition."⁶ And where the evidence brought forward to sustain the libel fails to make out the case therein alleged, the suit must fail, and no decree be rendered in behalf of the plaintiff, though other ground of relief should appear. Thus, where a wife brought her bill in equity against her husband, for a divorce from bed and board by reason of his cruelty and desertion, and in the proofs it appeared that at the time of the marriage he had a former wife living, thereby entitling her to a sentence of nullity, still she was refused this sentence, because the bill was not framed with reference to this relief.⁷

Hackney v. Hackney, 9 *Humph.* 450; *Thornbury v. Thornbury*, 2 *J. J. Mar.* 322.

¹ *Walton v. Walton*, 32 *Barb.* 203; *Whittington v. Whittington*, 2 *Dev. & Bat.* 64; *Clayton v. Clayton*, 1 *Ashm.* 52; and see *Moore v. Guest*, 8 *Texas*, 117; *Edmonds v. Her Husband*, 4 *La. An.* 489.

² *Smith v. Smith*, 1 *Swab. & T.* 359, 362. This case states distinctly that the prayer was "simply for a dissolution."

³ *Anonymous*, 27 *Maine*, 563.

⁴ *Johnson v. Johnson*, 4 *Wis.* 135.

⁵ *Ante*, 319.

⁶ *Davis v. Davis*, 37 *N. H.* 191, 192.

⁷ *Zule v. Zule*, *Saxton*, 96.

§ 330. How adultery, cruelty, desertion, or the like, is to be set out in the libel is matter to be considered under those several heads. The libel must always allege a marriage, and this rule applies as well in suits for nullity of marriage as in ordinary divorce suits.¹ It is the English ecclesiastical practice to set out the marriage somewhat at length; thus, one of the forms given in Coote's Ecclesiastical Practice is as follows: "That in the months of June, July, and August, in the year of our Lord one thousand eight hundred and twenty-five, the said Alexander Grant, Esquire, being then resident in Madras, in the East Indies, a bachelor, and free from all matrimonial contracts and engagements, made his courtship in the way of marriage to the said Maria Theresa Grant, then Maria Theresa de Champ, a spinster, and also free from all matrimonial contracts and engagements, who received such the courtship of him, the said Alexander Grant, and consented to be married to him; and that accordingly, on or about the twentieth day of the said month of August, one thousand eight hundred and twenty-five, they, the said Alexander Grant, who then was, and still is, a member of the church of Scotland by law established, and Maria Theresa Grant, then Maria Theresa de Champ, were lawfully joined together in holy matrimony according to the rites and ceremonies of the church of Scotland by law established, at Madras aforesaid, by the Reverend George James Lawrie, an ordained minister of the church of Scotland as by law established, appointed by the United Company of Merchants of England, trading to the East Indies, to officiate as chaplain within the presidency of Madras aforesaid, who then and there pronounced them to be husband and wife respectively." And the libel proceeds in another article to plead cohabitation under the marriage.²

§ 331. It was held, in a suit for the restitution of conjugal rights, not to be necessary to plead the age of the parties at the time of the marriage. "I am still disposed to hold," said

¹ Ante, § 253, 262, 265; Coote Ec. Pract. 320, 350, 362, 370, 377, 399, 411-416.

² Coote Ec. Pract. 320, 321.

Sir John Nicholl, "that, where it is pleaded that the parties were lawfully married, and the affidavit is exhibited in which the age is averred, and the entry of the marriage, that the averments are sufficient; it lies on the adverse party to show any thing he thinks may impeach it."¹ In a divorce case it was adjudged to be sufficient to plead that the parties were "lawfully married," without stating the marriage to have been by virtue of banns first duly had and published, or pursuant to a license first duly had, as the case may be. The word "lawfully," it was said, conveys the whole.² And although it was customary to aver, as in the precedent copied into our last section, a courtship as well as marriage, there was no legal necessity for the courtship to be mentioned; still, Dr. Lushington once observed of this matter: "When long established forms are departed from, the vigilance of the court is usually excited."³

§ 332. The present Matrimonial Court of England has adopted new rules of proceeding, and the following is the brief form in which the marriage is to be alleged: "That your petitioner was, on the — day of —, 18—, lawfully married to C. B. [the present name of the wife], then C. Z., widow, at ——" ⁴ And although the reports of our American tribunals seem to contain no cases which turned on the mere question of the allegation of the marriage, this brief form is believed by the writer to be sufficient in most, probably all, of our States. It has been held in New Hampshire, where the matter appears to be complicated with some other questions which concern the jurisdiction of the court, that the place at which the marriage occurred should be set out in the libel. And it was added, that, if the marriage were celebrated in New Hampshire, and the parties are described as residing there, no further allegation of residence is necessary. If they were married elsewhere, a subsequent

¹ Pool v. Pool, 2 Phillim. 119, 120.

² Leighton v. Leighton, 14 Jur. 318.

³ Dillon v. Dillon, 3 Curt. Ec. 86, 90, 7 Eng. Ec. 377, 379.

⁴ Swabey Div. 180.

residence of the libellant in the State at the time of the *delictum* must be averred; for the court has no jurisdiction over causes of divorce which occurred while the parties were residing in another State.¹

§ 333. The questions of what allegation of faculties, of property brought by the wife to the husband, and of the birth and present existence of children, the libel should contain, or whether any, will come up for discussion under appropriate heads hereafter. Having thus disposed of the principal matters of the libel, so far as the present discussion is concerned, it remains to inquire what ancillary or incidental matters must be set out in it. In New York, there were formerly some rules of the court of chancery requiring the bill to negative connivance, condonation, and the like,—the precise extent of which rules it is immaterial to inquire.² At present the matter in this State would seem to be regulated by a rule of the Supreme Court,—at least, regulated for that court,—adopted in 1854. It is as follows: “When the action is for a divorce on the ground of adultery, unless it is averred in the complaint that the adultery charged was committed without the consent, connivance, privity, or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed; and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and also, when at the time of the offence charged the defendant was living in adulterous intercourse with the person with whom the offence is alleged to have been committed, that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and the complaint containing such averments be verified by the oath of the plaintiff, in the manner prescribed by the 157th

¹ *Greenlaw v. Geenlaw*, 12 N. H. 200; ante, § 172-175. And see *Batchelder v. Batchelder*, 14 N. H. 380; *Mix v. Mix*, 1 Johns. Ch. 204; post, § 344.

² Ante, § 30, note; *Kane v. Kane*, 3 Edw. Ch. 389; *Johnson v. Johnson*, 1 Edw. Ch. 439; *Rose v. Rose*, 11 Paige, 166. And see as to Michigan, *Emmons v. Emmons*, Walker, Mich. 532.

section of the code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts."¹ Mention of this rule, however, is not made so much to guide New York practitioners, as to caution all readers, that there may be rules of court, or statutes of their own States, controlling such questions as those now under consideration.

§ 334. Connivance, condonation, and recrimination, are matters which properly belong to the defence; and, as a general proposition, where there is no statute or rule of court on the subject, it would plainly be irregular to introduce into the libel a denial of them.² Yet in the practice of the Ecclesiastical Courts there was some looseness on this subject, growing probably out of the fact, already mentioned, that the party made his allegation, whether it were the libel or a subsequent allegation, for the double purpose of exhibiting ground in law for the complaint, and drawing testimony out of witnesses and the opposite party. And as observed by Sir John Nicholl, "where the party himself has the benefit of being heard on his own statements, he should set forth every thing fully, or the court will take the statement to his disadvantage."³ And in these courts, as in all others, it was as a general proposition no objection to an allegation that it contained more than was necessary to entitle the party to his remedy.⁴

§ 335 [349.] And whether a cause is to be heard in the Ecclesiastical Courts or any other, the plaintiff is bound so to present his case as not to show himself at the same time

¹ Rule 64, Voorhies Code, 5th ed. 639.

² *Pastoret v. Pastoret*, 6 Mass. 276; *Lewis v. Lewis*, 9 Ind. 105; post, § 335, 337, 341. See, on this general subject, *Johnson v. Johnson*, 14 Wend. 637; *Haswell v. Haswell*, 1 Swab. & T. 502; *Backus v. Backus*, 3 Greenl. 186; *Davis v. Davis*, 19 Ill. 334; *Jeans v. Jeans*, 2 Harring. Del. 38; *Morrill v. Morrill*, 1 Barb. 318; *Wood v. Wood*, 2 Paige, 108; *Burdell v. Burdell*, 2 Barb. 473; *Burr v. Burr*, 2 Edw. Ch. 448.

³ *Rees v. Rees*, 3 Phillim. 387, 391, 1 Eng. Ec. 418, 419.

⁴ *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 125.

barred of his remedy;¹ and, if the bar appears in his own pleadings, he cannot have a divorce even though a jury should find a verdict in his favor.² In the ecclesiastical practice, he may, if he choose, introduce into his libel any matter which will make the history natural and consistent, and forestall suspicion of connivance; "for the party ought not to be forced ultimately to depend, for an explanation of his conduct, on the ingenuity of his counsel, or the discrimination of the court."³ The case may be such, that the plaintiff's only safety is in this form of pleading; because, if the matter of defence appears, either by his own admissions upon the record, or by the testimony of his witnesses, the court of its own motion, or moved by the opposing counsel, will take the objection at the hearing, though it appears not in allegation.⁴

§ 336 [349]. Yet it has been doubted, whether, even under the ecclesiastical practice, the defendant can set up *connivance* merely on interrogatories proposed by himself to the plaintiff's witnesses; at all events the evidence must be unequivocal, and incapable of explanation; and the court will give the plaintiff opportunity to explain it, if he can.⁵ Still we shall find it difficult to see, how, if connivance or any other defence comes out in proof,⁶ the court, as representing the public which does not plead, can refuse to give heed to the evidence, though the party could claim nothing. But perhaps this precise question can arise only in the peculiar practice of the Ecclesiastical Courts, which permits the testimony to be taken on the allegations of either party before the adverse party has closed his pleadings; so that, while the right to cross-examine on this matter was unquestioned

¹ *Crewe v. Crewe*, 3 Hag. Ec. 123, 125, 5 Eng. Ec. 45, 46; *Johnson v. Johnson*, 1 Edw. Ch. 439; post, § 340.

² *Moss v. Moss*, 2 Ire. 55; ante, § 329.

³ *Croft v. Croft*, 3 Hag. Ec. 310, 312, 5 Eng. Ec. 120, 121.

⁴ *Crewe v. Crewe*, 3 Hag. Ec. 123, 124, 5 Eng. Ec. 45, 46; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130; *Smith v. Smith*, 4 Paige, 432.

⁵ *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130.

⁶ Ante, § 253.

in England, under the ecclesiastical system, it may not, probably does not, exist in this country.¹

§ 337 [381]. In the practice of the Ecclesiastical Courts, the promoter usually alleges, in the libel, a withdrawal from cohabitation with the defendant, upon the last act of cruelty being inflicted;² or receiving knowledge of the adultery;³ but only thus argumentatively does the libel deny *condonation*. This form of pleading seems naturally to constitute a part of the voluminous allegations, which must always incumber a case where the evidence is taken in the mode pursued in those courts; but it is not adapted to the practice of other tribunals. And in England, it has been said, that slight proof of this allegation is sufficient.⁴ Truly, however, both there and here, *condonation* is but matter of defence; it may accompany a denial of the offence charged;⁵ and it must be pleaded by the defendant, or he will have no right to take advantage of it.⁶ And Sir John Nicholl has said: "I know not of any case where *condonation* has been held to estop a party, where it has not been pleaded."⁷ In the American practice, there is no necessity for the libel to contain any denial of *condonation*.⁸

§ 338 [382]. But in consequence of the triangular character of the matrimonial suit, as before discussed,⁹ it follows, that, whenever the fact of *condonation* having passed appears in the case, it is fatal to the plaintiff's claim, though the defendant has not pleaded it; not because the defendant has any just right to take the objection, but because public policy

¹ See post, § 339.

² Coote Ec. Pract. 356.

³ *Ib.* 334.

⁴ Dr. Lushington, in *Caton v. Caton*, 13 Jur. 431, 434.

⁵ *Smith v. Smith*, 4 Paige, 432; *Wood v. Wood*, 2 Paige, 108; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 380.

⁶ *Smith v. Smith*, 4 Paige, 432; *Adams v. Hurst*, 9 La. 243; *Timminge v. Timminge*, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 26; *Jeans v. Jeans*, 2 Harring. Del. 38; ante, § 334.

⁷ *Durant v. Durant*, 1 Hag. Ec. 733, 752, 3 Eng. Ec. 310, 319. But see *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158.

⁸ *Karp v. Karp*, 1 Jones Eq. 239.

⁹ Ante, § 231, 234, 253.

does not permit the divorce; and the public, which does not plead, objects through the conscience of the judge. And Chancellor Walworth went so far as to say, that, if there is reason to believe this defence exists, the court, *ex officio*, may at any time before a final decree direct an inquiry to ascertain the fact.¹ Therefore where, in a case taken *pro confesso*, and referred to a master for proofs, the master's report left it doubtful, whether the complainant had not voluntarily cohabited with the defendant after knowledge of the last act of adultery charged, such cohabitation having occurred after knowledge of several previous acts, there was ordered a reference back to the master of the question, whether this last act was condoned.² But where a decree for divorce had been regularly obtained by the wife against her husband, while he was in the state prison on conviction for a felony, and no doubt existed of the fact of the matrimonial offence complained of having been committed; the court would not open the decree, for the purpose of enabling him to set up condonation of the offence.³

§ 339 [383]. In the ecclesiastical practice has arisen an-

¹ *Smith v. Smith*, 4 Paige, 432. On no principle, other than is here suggested, can we account for the decision of the Supreme Court of Maine, in *Backus v. Backus*, 3 Greenl. 136; a brief case, and not apparently much considered; where, on a general traverse to the libel, and without special plea, the respondent was permitted to show a condonation of the adultery, by subsequent cohabitation. The court is reported to have observed, that such evidence had always been heard in any stage of the cause, even after a default. And see *Elwes v. Elwes*, 1 Hag. Con. 269, 292, 4 Eng. Ec. 401, 411.

² *Dodge v. Dodge*, 7 Paige, 589. It is observable, however, that a rule of the New York Court of Chancery required every plaintiff to aver in his bill, "that he has not voluntarily cohabited with the defendant since the discovery" of the adultery. Rule 168. Therefore when a bill, on being taken as confessed, was referred to a master for proofs, the court held it necessary for him to inquire, whether, since the plaintiff obtained knowledge of the adultery, there had been any condonation of it by voluntary cohabitation. *Pugsley v. Pugsley*, 9 Paige, 589; *Kane v. Kane*, 3 Edw. Ch. 389; *Dobbs v. Dobbs*, 3 Edw. Ch. 377; *Emmons v. Emmons*, Walk. Mich. 532. And see *Johnson v. Johnson*, 14 Wend. 637.

³ *Hofmire v. Hofmire*, 7 Paige, 60; s. c. before the V. C., *nom. Hoffmire v. Hoffmire*, 3 Edw. Ch. 173. For the contrary doctrine to what is maintained in this section, see *Lewis v. Lewis*, 9 Ind. 105. See ante, § 253.

other difficulty alluded to when speaking of connivance,¹ which difficulty would not arise, certainly not to the same extent, under our different procedure. There a defendant, in his interrogatories to the plaintiff's witnesses, may inquire, not only into matters alleged in the libel, but also into such as he intends himself to allege in his responsive allegation, thereafter to be produced. But suppose he does not afterward tender the allegation, or does not therein set up the condonation; still the evidence exists in the case, rightfully drawn forth by a party who has no right to use it without a plea; and the question is, what the court will do with it. Two points however seem, on the whole, to be established; first, that the court will not suffer the plaintiff to be surprised, but will give him, if necessary, an opportunity to explain; secondly, that, if the condonation is thus proved "by the clearest and most conclusive evidence," the divorce will be withheld, not otherwise; "for, if [the matter] had been expressly pleaded, the other party might have produced further evidence to explain and disprove the defence."²

§ 340 [384]. Plainly, then, if a condonation appears on the face of the proofs or allegations of the party complaining, he, being bound to present a case which does not at the same time show a bar, cannot have the divorce.³ And when thus the condonation is to be inferred from the pleadings of such party himself, the rule we have just considered,⁴ that it must be established, when not set up in defence, by the clearest and most conclusive evidence, does not apply.⁵ So the peculiar form of the plaintiff's allegation may cast upon him the burden of showing, affirmatively, that there was no

¹ Ante, § 336.

² *Durant v. Durant*, 1 Hag. Ec. 733, 3 Eng. Ec. 310, 317, 319; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 11; *Turton v. Turton*, 3 Hag. Ec. 338, 5 Eng. Ec. 130; *Beeby v. Beeby*, 1 Hag. Ec. 789, 795, 3 Eng. Ec. 338, 341; *Elwes v. Elwes*, 1 Hag. Con. 269, 292, 4 Eng. Ec. 401, 411. • And see ante, § 336.

³ *North v. North*, 5 Mass. 320; *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 23; *Snow v. Snow*, 2 Notes Cas. Supp. 1, 12; *Popkin v. Popkin*, 1 Hag. Ec. 766, 3 Eng. Ec. 325; ante, § 335.

⁴ Ante, § 339.

⁵ *Snow v. Snow*, supra.

condonation; as, it seems, if the husband states in his libel that the wife slept at his house the night after she committed adultery, of which adultery he had knowledge, he must show he did not sleep with her.¹

§ 341 [408]. In like manner, a defendant, who would rely upon matter of *recrimination*, must plead and prove it.² Even where, in the chancery practice, the bill has been taken *pro confesso*, without plea, evidence of the recriminatory matter has been deemed inadmissible on the hearing before the master to establish the defendant's guilt.³ A plea of recrimination may be joined with a denial of guilt.⁴ And where the complainant has committed adultery since the answer or plea was put in, the defendant will be permitted, on application made within a reasonable time after the discovery of the fact, to set the fact up in plea, or in a supplemental answer, or by a cross-bill in the nature of a plea *puis darrien continuance*.⁵ And it has been intimated, as it would seem necessarily to follow from established principles, that, when a case has been sent to a jury, — if the plaintiff, after a verdict in his favor, but before a decree, contracts a second marriage and cohabits under it, he can have no benefit from the verdict;⁶ the rule being, that adultery will bar, if committed at *any time before sentence*.⁷

§ 342 [413]. Accordingly in the ecclesiastical practice, the plaintiff sometimes introduces into his libel articles accounting for his *delay* in instituting the suit, this is an admissible

¹ *Timmings v. Timmings*, 3 Hag. Ec. 76, 5 Eng. Ec. 22, 26; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 390. And see *Johnson v. Johnson*, 1 Edw. Ch. 439.

² *Smith v. Smith*, 4 Paige, 432; *Pastoret v. Pastoret*, 6 Mass. 276.

³ *Johnson v. Johnson*, 14 Wend. 637. See ante, § 338, note.

⁴ *Smith v. Smith*, supra; *Hopper v. Hopper*, 11 Paige, 46; *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358; *Wood v. Wood*, 2 Paige, 108.

⁵ *Smith v. Smith*, supra; *Brisco v. Brisco*, 2 Add. Ec. 259, 2 Eng. Ec. 294.

⁶ *Stanford v. Stanford*, 1 Edw. Ch. 317.

⁷ *Brisco v. Brisco*, supra; *Smith v. Smith*, supra. See ante, § 335, 336, 339.

course of procedure;¹ but he need not examine witnesses upon them, unless the defence is such as to require him to justify his conduct.² The court has sometimes called upon the husband for his affidavit explanatory of his delay.³ And in a New Hampshire case, the judge observed: "The extreme cruelty complained of was eight years prior to the application for the divorce, and no reason is assigned why an earlier application was not made, which should have been given" in the libel.⁴ It is doubtful, however, whether this view, even in the case of so considerable a lapse of time, accords with the general American practice and doctrine.

§ 343. In the famous case of *Evans v. Evans*, which was a suit for cruelty brought by the wife against the husband, Lord Stowell observed: "In her libel she pleads, as is usual," — a practice which we are informed in a note by the reporter has since been discontinued, — "though not necessary, and sometimes disadvantageous, her virtuous education, and good disposition, and her excellent conduct in the characters of a wife and a mother. One inconvenience arises from an article of this kind, that it gives opportunity and invitation to the other party to counterplead, in contradiction to this good character, as has been done in this case, in which a counterplea is given full of unfavorable epithets applied to her, and, amongst others, that she is a woman subject to habits of intoxication."⁵ The temptation is very strong, in these cases, when in the hands of a prolific pleader, to expatiate on the good qualities of the plaintiff; but the method most to be approved, is to omit all such matter. Often the American libel, when brought on behalf of the wife, contains the statement that she has been a good, virtuous, and

¹ *Mortimer v. Mortimer*, 2 Hag. Con. 310.

² *Richardson v. Richardson*, 1 Hag. Ec. 6, 3 Eng. Ec. 13. And see *Vallean v. Vallean*, 6 Paige, 207; *Fellows v. Fellows*, 8 N. H. 160.

³ *Loader v. Loader*, cited in *Gilpin v. Gilpin*, 3 Hag. Ec. 150, 5 Eng. Ec. 58, 60.

⁴ *Fellows v. Fellows*, 8 N. H. 160. And see *McCafferty v. McCafferty*, 8 Blackf. 218.

⁵ *Evans v. Evans*, 1 Hag. Con. 35, 95, 4 Eng. Ec. 310, 338, note.

obedient wife, or something of this sort. There is probably no legal objection to such a single phrase in the libel, — But why place the wife in the position of one bestowing praise on herself, when, if any thing is to be shown against her, it should be alleged on the other side?

§ 344. In Alabama, it is provided by statute, that, when the defendant does not live within the State, the plaintiff "must have been a *bona fide* resident of this State for one year next before the filing of the bill; which must be alleged in the bill, and proved."¹ And there are other States in which, either by express enactment, or by judicial interpretation of the statutes, something corresponding to this Alabama provision is required in respect to the allegation and the proof. The practitioner who is familiar with the general principles of pleading will be able easily to satisfy himself upon every such point, on consulting the statutes of his State.² And in particular States there may be still other like matters to which the pleader will look.

III. *The Pleadings Subsequent to the Libel.*

§ 345. It was observed in a Maine case, that "the strict rules of pleading applicable to common-law cases have not been followed in libels for divorce."³ And the writer is persuaded, from his general impression of the cases as he finds them in the reports, that but little attention has been paid in most of our States to the pleadings subsequent to the libel. Where the proceeding is by bill in equity, drawn

¹ *Edwards v. Edwards*, 30 Ala. 394; *Crossman v. Crossman*, 33 Ala. 486.

² The following cases may be consulted: *Batchelder v. Batchelder*, 14 N. H. 380; *Fellows v. Fellows*, 8 N. H. 160; *Smith v. Smith*, 12 N. H. 80; ante, § 332; *Lattier v. Lattier*, 5 Ohio, 538; *McIntyre v. McIntyre*, Wright, 135; *Guild v. Guild*, 16 Vt. 512; *Mix v. Mix*, 1 Johns. Ch. 204; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Emmons v. Emmons*, Walker, Mich. 532; *Townsend v. Townsend*, 2 R. I. 150; *Lesener v. Lesener*, 31 Barb. 330.

³ *Vance v. Vance*, 17 Maine, 203, 204.

in due equity form, the subsequent pleadings will take the course usual in the equity tribunals. Where the proceeding is not in equity, some decent regard to the ordinary practice must be paid in these cases.¹

§ 346. In some form, according to the custom most prevailing in this country, the respondent must make written answer,—not in the sense of the personal answer, as used in the Ecclesiastical Courts,²—to the plaintiff's libel.³ This may be either by a sort of general issue, in which the allegations of the libel are simply denied, or it may be by setting up some special matter, such as condonation, or the like. And although the defendant makes the general issue or denial, he may join therewith the special matter. Thus, though the answer denies the adultery charged in the bill, it may set up, in connection with this denial, condonation or recrimination.⁴ And in like manner, a defendant may set up connivance in plea, without admitting the truth of the plaintiff's allegation, or may join such plea with a denial of guilt.⁵ And unless defences of this kind are set up in the answer, they cannot be proved on the trial.⁶

§ 347. How adultery is to be alleged, where the party relies upon it as cause of divorce, we shall see under the title Adultery in this volume. The same particularity which is required in a libel setting up this matter, is required when

¹ And see further on this subject, *Ewing v. Ewing*, 2 Philad. 371, bottom paging, where it was held that a plea and a demurrer could not be put in at the same time; *Turner v. Turner*, 3 Greenl. 398; *Jones v. Jones*, 18 Maine, 308; *Ristine v. Ristine*, 4 Rawle, 460; *Morrell v. Morrell*, 3 Barb. 236.

² Ante, § 217, 281.

³ *Orrok v. Orrok*, 1 Mass. 341; *Allen v. Allen*, 1 Hemp. 58; *Ristine v. Ristine*, 4 Rawle, 460; *Healer v. Healer*, Wright, 210; *Mooser v. Mooser*, 29 Ala. 318; *Richmond v. Richmond*, 10 Yerg. 348.

⁴ *Wood v. Wood*, 2 Paige, 108; ante, § 337.

⁵ *Rogers v. Rogers*, 3 Hag. Ec. 57, 5 Eng. Ec. 13; *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360; *Moorsom v. Moorsom*, 3 Hag. Ec. 87, 5 Eng. Ec. 28; *Gilpin v. Gilpin*, 3 Hag. Ec. 150, 5 Eng. Ec. 58; *Austin v. Austin*, 10 Conn. 221.

⁶ *Lewis v. Lewis*, 9 Ind. 105; ante, § 236, 252, 257, 336, 338-341.

the like matter is brought forward in the way of recrimination.¹ But an answer, it has been laid down in New York, setting up adultery of the plaintiff as a defence, need not allege, that the parties were inhabitants of the State at the time when it was committed, or that the defendant was ever an inhabitant.²

§ 348. Where a defendant pleads condonation, if the plaintiff would avoid the effect of it by showing subsequent misconduct, he should set up this matter in answer to the plea.³

§ 349. In these suits, matter which occurred subsequently to the bringing of the suit may under some circumstances be introduced;⁴ but there is nothing connected with this proposition which requires a particular examination.

¹ *Morrell v. Morrell*, 1 Barb. 318; *Wood v. Wood*, 2 Paige, 108; *Burr v. Burr*, 2 Edw. Ch. 448; *Garrett v. Garrett*, 12 Ind. 407; *Holsten v. Holsten*, 23 Ala. 777.

² *Lesener v. Lesener*, 31 Barb. 330.

³ *Jeans v. Jeans*, 2 Harring. (Del.) 38.

⁴ *Burdell v. Burdell*, 2 Barb. 473; ante, § 316, 319.

BOOK V.

ANCILLARY PROCEEDINGS AND DECREES ATTENDANT ON THE MAIN ISSUE.

CHAPTER XIX.

PRELIMINARY INQUIRY CONCERNING ALIMONY AS AN INDEPENDENT REMEDY UNACCOMPANIED BY DIVORCE.

§ 350. BEFORE we enter directly upon the discussion of the principal topics intended for this division of our subject, it seems desirable to consider the doctrines which pertain to alimony as awarded in a few of our States, when there is no divorce. Let it first be observed, however, that the divorce suit is peculiar in drawing to itself various ancillary matters, which, of themselves, are really independent of the main matter, therefore requiring to be considered under separate titles. Alimony, though usually a dependent on a divorce suit, is, in a very high sense, an independent thing, having its own procedure, its own separate sentence, and a life distinct from the main life of the final decree.

§ 351 [549]. Alimony, as the term is used in divorce law, is the allowance which a husband, by order of court, pays to his wife living separate from him, for her maintenance; or, it may be the provision which is made by the court for the sustenance of a wife divorced from the bond of matrimony, out

of her late husband's estate, — this latter branch of the definition, however, being a matter which pertains only to the modern law, not to the ancient.¹ The allowance may be for her use either during the pendency of a suit, in which case it is called alimony *pendente lite*, or after its termination, called permanent alimony. It has no common-law existence as a separate, independent right; but, wherever found, it comes as an incident to a proceeding for some other purpose, as for a divorce; no court in England having any jurisdiction to grant it, where it is the only relief sought.²

§ 352 [550]. "I take it," says Lord Loughborough, "to be now the established law, that no court, not even the Ecclesiastical Court, has any original jurisdiction to give a wife a separate maintenance. It is always as incidental to some other matter, that she becomes entitled to a separate provision. If she applies in this court [a court of equity] upon

¹ The following are some of the definitions of alimony, found in the books: "Alimony, although it properly signifies nourishment or maintenance, when strictly taken; yet now, in the common legal and practical sense, it signifies that proportion of the husband's estate which the wife sues in the Ecclesiastical Court, to have allowed her for her present subsistence and livelihood, according to law, upon any such separation from her husband as is not caused by her own elopement or adultery." Godol. Ab. 508. "Alimony signifies that legal proportion of the husband's estate, which, by the sentence of the Ecclesiastical Court, is allowed to the wife for her maintenance, upon the account of any separation from him." Ayl. Parer. 58. "Alimony, in its legal sense, may be defined to be that proportion of the husband's estate, which is judicially allowed and allotted to a wife, for her subsistence and livelihood, during the period of their separation." Ruffin, C. J., in *Rogers v. Vines*, 6 Ire. 293, 297. "Alimony is the maintenance or support which a husband is bound to give to his wife, upon a separation from her; or the support which either father or mother is bound to give to his or her children, though this is more usually called maintenance." Strong, Senator, in *Burr v. Burr*, 7 Hill, N. Y. 207. "Alimony is maintenance afforded to the wife, where the husband refuses to give it, or where his improper conduct compels her to separate from him. It is not a portion of his real estate, to be assigned to her in fee-simple, subject to her control, or to be sold at her pleasure; but a provision for her support, to continue during their joint lives, or so long as they live separate." Martin, J., in *Wallingsford v. Wallingsford*, 6 Har. & J. 485. See also *Parsons v. Parsons*, 9 N. H. 309; *Wooldridge v. Lucas*, 9 B. Monr. 49; *Clark v. Clark*, 6 Watts & S. 85; 1 Bl. Com. 441.

² *Rees v. Waters*, 9 Watts, 90, 93; *Head v. Head*, 3 Atk. 547; *Lawson v. Shotwell*, 27 Missis. 630, 633; *Bankston v. Bankston*, 27 Missis. 692.

a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that, the chancellor will allow her separate maintenance; so in the Ecclesiastical Court, if it is necessary, for a divorce *a mensâ et thoro propter sævitiam*.”¹ But other authorities raise at least the doubt, whether alimony as a permanent allowance to the wife is not solely confined to suits for divorce, and whether courts of equity can grant it upon a *supplicavit* for security of the peace.² Equity will sometimes enforce the specific performance of the husband’s undertaking to pay money for the support of his wife, while the parties are living separate.³

§ 353 [551]. In England, during the Commonwealth, the Ecclesiastical Courts were abolished; and then the equity judges were expressly authorized, probably by a clause in their commissions,⁴ to decide causes of alimony; and, after

¹ Ball v. Montgomery, 2 Ves. 191, 195.

² Upon this point, Mr. Sumner, in a note to Ball v. Montgomery, *supra*, (Am. ed.) after referring to 2 Story Eq. Jurisp. § 1422, adds: “It is said, however, that there is no modern instance of the exercise of this authority upon a writ of *supplicavit*. 2 Story Eq. Jurisp. § 1423, 1476; 2 Roper Husb. & Wife, c. 22, § 4, p. 309, note; *Ib.* § 5, p. 317-320; Clancy Mar. Women, b. 5, c. 1, p. 453-455. Mr. Chancellor Kent seems to have doubted, whether the writ ought now to be granted in Chancery, as the remedy at law was complete. Codd v. Codd, 2 Johns. Ch. 141. Mr. Justice Story adds, that it is difficult, upon the authorities, to maintain this doubt. 2 Story Eq. Jurisp. 1476, note.” The authorities cited in the remaining portion of Mr. Sumner’s note may also be consulted.

³ Angier v. Angier, 1 Gilb. Ch. 152; Head v. Head, 3 Atk. 295, 547; Watkyns v. Watkyns, 2 Atk. 96; Hobbs v. Hull, 1 Cox, 445; Wilkes v. Wilkes, 2 Dick. 791; 2 Chitty Gen. Pract. Am. Ed. 434, 435, 462.

⁴ That the express authority stated in the text was granted to the equity judges, I can refer only to Fonblanque, who, upon this point, says: “During the time of the troubles, commissioners were appointed to whom jurisdiction was expressly given [to hear causes of alimony], and whose decrees were held to be confirmed by the act for the confirmation of judicial proceedings.” Again: “It is observable, that, if courts of equity had an original and concurrent jurisdiction with the spiritual courts, it would have been unnecessary to give the commissioners, during the troubles, such jurisdiction; and the doubt which was entertained could not have been raised, respecting the validity of their decrees, after the act confirming judicial proceedings.” Fonb. Eq. 96, 97, note. It was so easy for an English writer to ascertain the fact, concerning this special authority having been conferred, or not, upon the commissioners, that it is not presumable this author is mistaken, though he seems not to have referred to the sources of his information.

the Restoration, their decrees were by statute confirmed. Accordingly, it has sometimes been erroneously supposed, that these judges took cognizance of this question as belonging to their appropriate jurisdiction, to prevent a failure of justice, simply because there were no ecclesiastical tribunals, or as succeeding to them. But obviously this could not be so; since, if the matter pertained to the equity jurisdiction properly, they would have exercised this function both before and after the usurpation, without reference to the ecclesiastical tribunals;—for the latter never claimed this authority, what they did in the premises having been to grant divorce, and to decree alimony only as a mere incident in the divorce suit;—and since, if they took up the jurisdiction in the time of the Commonwealth, as the natural successors to the defunct Ecclesiastical Courts, it must have been the jurisdiction which those courts had exercised, namely, to decide causes of divorce. But this they did not do; they heard suits for alimony, not for divorce.¹

§ 354 [552]. We have seen, that ecclesiastical judicatories were never established in this country, either in the colonies or the States.² But in some of the colonies and States, the courts of equity have exercised the authority, not of granting divorces, but alimony, where the latter was the only relief

¹ On this subject, see *Whorewood v. Whorewood*, 1 Ch. Cas. 153; *Oxenden v. Oxenden*, 1 Gilb. Ch. 1, 2 Vern. 493; *Angier v. Angier*, 1 Gilb. Ch. 152; *Head v. Head*, 3 Atk. 295, 547; *Anonymous*, 2 Show. 282; *Lasbrook v. Tyler*, 1 Ch. R. 44; *Ashton v. Ashton*, 1 Ch. R. 164; *Russell v. Bodvil*, 1 Ch. R. 186; *Whorewood v. Whorewood*, 1 Ch. R. 223; *Watkins v. Watkins*, 2 Atk. 96; *Duncan v. Duncan*, 19 Ves. 394; *Wilkes v. Wilkes*, 2 Dick. 791; *Foden v. Finney*, 4 Russ. 428; *Colmer v. Colmer*, *Moseley*, 118; *Nicholls v. Danvers*, 2 Vern. 671; *Williams v. Callow*, 2 Vern. 752; *Yeo v. Yeo*, 2 Dick. 498; *Hyat's case*, Cro. Jac. 364. *Bonblanque* says: "In *Nicholls v. Danvers*, 2 Vern. 671, proceedings had been had against the husband (as appears from the register's book, though not noticed in Mr. Vernon's Report) in the Ecclesiastical Court, *propter sevitiam*." 1 Fomb. Eq. 96, note. See also 1 Mad. Ch. Pract. 386, note; 2 Bright *Husb. & Wife*, 354; *Shelford Mar. & Div.* 598; *Reeve Dom. Rel.* 309; 2 Story *Eq. Jurisp.* § 1432; *Ayl. Parer.* 59, 60; *Godol. Ab.* 503; ante, § 352. The American cases are cited post, § 354-357.

² Vol. I. § 71.

prayed; and, in some of these States, perhaps also in States where the jurisdiction was never admitted as of common law right, the right has been conferred by statutes.¹

§ 355 [553]. Thus, the High Court of Chancery in Maryland exercised this jurisdiction, from the earliest colonial times, under the belief of its belonging to it, in the absence of ecclesiastical tribunals;² and, in 1777, a statute provided, "that the Chancellor shall and may hear and determine all causes for alimony, in as full and ample a manner as such causes could be heard and determined, by the laws of England, in the Ecclesiastical Courts there." Under this statute, the wife may have alimony for any cause authorizing the divorce from bed and board in England; and even, sometimes, under other circumstances;³ but the court understands itself not empowered to extend the remedy, and

¹ *Miller v. Miller*, Saxton, 386; *Lockridge v. Lockridge*, 3 Dana, 28; *Turrel v. Turrel*, 2 Johns. Ch. 391. And see *Mix v. Mix*, 1 Johns. Ch. 108. So in Ohio. *Swan's Stat.* 294; Page on Div. 290. *Jones v. Jones*, Wright, 155; *Healer v. Healer*, Wright, 210; *Bascom v. Bascom*, Wright, 632; *Questel v. Questel*, Wright, 491; *Wilson v. Wilson*, Wright, 128; *Johnston v. Johnston*, Wright, 454; *D'Arusmont v. D'Arusmont*, 14 Law Reporter, 311, 8 West. Law Jour. 548.

² *Helms v. Franciscus*, 2 Bland, 544; *Fornhill v. Murray*, 1 Bland, 479; *Macnamara's case*, 2 Bland, 566, note; *Scott's case*, 2 Bland, 568, note; *Govane's case*, 2 Bland, 570, note. See also *Raymond's Ch. Dig.* 285. In *Macnamara's case*, decided anterior to the Revolution, the defendant claimed an appeal to the *Arches Court*, in England; and his right to the appeal seems, on what principle it does not appear, to have been acknowledged. In the case of *Galwith v. Galwith*, 4 Har. & McH. 477, apparently adjudicated in the year 1689, the county court ordered, "that the said John Galwith [the defendant] take home with him his said wife Jane Galwith, to dwell with him as man and wife ought to do; or otherwise to allow and maintain her, 3,000 wt. of tobacco a year, to commence from that day." On appeal by the defendant to the provincial court, the following errors were assigned; namely, 1st. That the county court, upon reading the petition, without calling the said John to answer, passed judgment against him. 2d. That the said county court had no jurisdiction of the matter, being touching alimony, which is not recoverable but in chancery, or in the court of the ordinary. 3d. That the court cannot take cognizance of matters relating to separation and divorce between man and wife, but such matters are only triable and examinable in the court of ordinary. The judgment was thereupon reversed, but we are left in doubt what was the precise ground of the reversal.

³ *Jamison v. Jamison*, 4 Md. Ch. 289, 295.

decree a divorce also.¹ In early times likewise in North Carolina, bills in equity by the wife against the husband, claiming alimony, appear to have been sustained without question as to the lawfulness of the jurisdiction.² In one of these early cases there was a demurrer, because the suit was brought by the wife without the intervention of a *prochein amie*; but the demurrer was overruled, two precedents being cited, showing the practice of the court in these suits.³ The inherent jurisdiction of chancery to grant alimony is also acknowledged in Virginia,⁴ in Kentucky,⁵ in South Carolina,⁶ and in Alabama.⁷ So it is in Jamaica and Barbadoes.⁸

¹ *Helms v. Franciscus*, and *Fornhill v. Murray*, *supra*. Whether the court would have jurisdiction aside from the statute, query. *Wallingsford v. Wallingsford*, 6 Har. & J. 485. And see *Hewitt v. Hewitt*, 1 Bland, 101; *Crane v. McGinnis*, 1 Gill & J. 463; *Wright v. Wright*, 2 Md. 429; *Wiles v. Wiles*, 3 Md. 1; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140.

² *Anonymous*, 1 Hayw. 347; *Spiller v. Spiller*, 1 Hayw. 482, A. D. 1796, 1797.

³ *Knight v. Knight*, 2 Hayw. 101; *ante*, § 302-304.

⁴ *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Almond v. Almond*, 4 Rand. 662. In *Purcell v. Purcell* the Chancellor admits, that doubt and contradiction attend the English authorities, and so proceeds to consider the question on principle. Whereupon he lays down the following doctrine, certainly sufficiently radical, not to say novel: "I hold, that, in every well-regulated government, there must somewhere exist a power of affording a remedy where the law affords none; and this peculiarly belongs to a court of equity; and, as husband and wife are considered as one person in law, it is evident, that, in this case, the law can afford no remedy; which is universally admitted to be a sufficient ground to give this court jurisdiction; and, therefore, it must entertain the bill." It is by no means universally admitted, that a court of equity will take jurisdiction of a subject, simply because the common law tribunals afford no remedy. 1 Story Eq. Jurisp. § 62.

⁵ *Lockridge v. Lockridge*, 3 Dana, 28. In *Butler v. Butler*, 4 Litt. 201, the court review the English authorities, deem them conflicting, and conclude to follow those most consonant to reason and equity. On this ground, the judges sustain the jurisdiction; and further determine, that the statute which authorizes a decree of alimony in certain cases does not exclude their authority over cases not embraced in it, "which have strong moral claims." And see *Bogges v. Bogges*, 4 Dana, 307; *Wooldridge v. Lucas*, 7 B. Monr. 49.

⁶ *Jelineau v. Jelineau*, 2 Des. 45; *Prince v. Prince*, 1 Rich. Eq. 282; *Threewitts v. Threewitts*, 4 Des. 560; *Prather v. Prather*, 4 Des. 33; *Mattison v. Mattison*, 1 Strob. Eq. 387.

⁷ *Glover v. Glover*, 16 Ala. 440. And see *Wray v. Wray*, 33 Ala. 187.

⁸ 1 Burge Col. & For. Laws, 660; 2 Burn Ec. Law, Phillim. ed. 500; *Shelford Mar. & Div.* 368. As to Rhode Island, see *Batley v. Batley*, 1 R. I. 212.

§ 356 [554]. But these are exceptions to the general rule, and departures likewise from principle. In some of the other States, the jurisdiction has been expressly denied; in still others, by necessary implication; and probably it could not now be established in any State where it had not already been maintained,¹ though there are some strength of argument and some apparent weight of authority in favor of the jurisdiction.

§ 357. In Upper Canada there is a statute providing, "that the Court of Chancery shall have the like power, authority, and jurisdiction, in all cases of claim for alimony, that is exercised and possessed by any ecclesiastical or other court in England." And the court has held, not without some hesitation as to the true construction of the statute, that, under this provision, it can grant alimony, and only alimony,—not a divorce, not a restitution of conjugal rights.² But it has been strongly intimated, that, under this statute, desertion, which under the English ecclesiastical law would furnish ground only for a suit for the restitution of conjugal rights, is a *delictum* on which the decree for alimony may be based.³

§ 358 [555]. The causes for which, where this jurisdiction is acknowledged, equity will thus decree alimony, seem not to be very clearly defined. Desertion is held to be sufficient,⁴ especially where it has been accompanied, as it is almost of

¹ *Fischli v. Fischli*, 1 Blackf. 360; *Peltier v. Peltier*, Harring. Mich. 19; *Rees v. Waters*, 9 Watts, 90, 93; *Pomeroy v. Wells*, 8 Paige, 406; *Parsons v. Parsons*, 9 N. H. 309; *McGee v. McGee*, 10 Ga. 477; *Doyle v. Doyle*, 26 Misso. 545, 549; *Yule v. Yule*, 2 Stock. 138; *Chapman v. Chapman*, 13 Ind. 396, 397. And see post, § 369, 374, 384.

² *Severn v. Severn*, 3 Grant, U. C. Ch. 431; *Soules v. Soules*, 2 Grant, U. C. Ch. 299.

³ *Severn v. Severn*, supra, p. 447.

⁴ *Prince v. Prince*, 1 Rich. Eq. 282, 287; *Wiles v. Wiles*, 3 Md. 1; *Jamison v. Jamison*, 4 Md. Ch. 289. On the other hand, mere abandonment has been thought insufficient; the husband must also refuse either to live with his wife, or contribute to her maintenance. *Logan v. Logan*, 2 B. Monr. 142. See ante, § 355, 357.

necessity, with a total neglect to provide for the wife.¹ So is cruelty an adequate cause; but it must have proceeded to the extent necessary to authorize an ecclesiastical tribunal to separate the parties from bed and board.² And the wife who relies on ill-usage by her husband, must show her own conduct to have been correct,³ though it need not have been entirely blameless.⁴

§ 359 [555]. Indeed it seems to have been considered, what is probably the true view, that the equity court should require the same causes, which, in England, would justify the ecclesiastical, in either separating the parties from bed and board, or decreeing a restitution of conjugal rights.⁵ Yet adultery alone, according to some judicial views, seems insufficient to lay the foundation for alimony, if the husband will agree to cohabit with his wife, and treat her well.⁶ Where adequate cause for alimony was not shown; but the complaining wife had left her husband, and he manifested a determination not to receive her back; and there was a settlement of the estate which was hers before the marriage, by which settlement "the rents and profits of it were to accrue to the defendant and complainant during their joint lives, he to be entitled to take the same;" and the defendant at first offered, in his answer, to divide these rents and profits equally

¹ *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Butler v. Butler*, 4 Litt. 201; *Colmer v. Colmer*, Moseley, 118. And see *Batley v. Batley*, 1 R. I. 212.

² *Taylor v. Taylor*, 4 Des. 167; *Jelineau v. Jelineau*, 2 Des. 45; *Anonymous*, 4 Des. 94; *Almond v. Almond*, 4 Rand. 662; *Lockridge v. Lockridge*, 3 Dana, 28; *Glover v. Glover*, 16 Ala. 440. And see Vol. I. § 719, note.

³ *Anonymous*, 4 Des. 94; Vol. I. § 764. Also it was observed in Kentucky, that, "although a wife not entitled to a dissolution of the conjugal relation may be entitled to alimony, according either to our statute or the common law, yet a wife who has voluntarily abandoned her husband should not have a decree for her separate maintenance, unless her abandonment of him was, without her fault, rendered necessary for her safety or happiness, and was consistent with social order and public policy." *Bogges v. Bogges*, 4 Dana, 307.

⁴ *Griffin v. Griffin*, 8 B. Monr. 120.

⁵ *Rhame v. Rhame*, 1 McCord Ch. 197. And see *Helms v. Franciscus*, 2 Bland, 544; ante, § 355, 357.

⁶ *Prather v. Prather*, 4 Des. 33; post, § 361 and note.

with her,—the court would not afterward, while he would not consent to accept of her return, allow him to withdraw the offer.¹ In Maryland and Tennessee the courts have intimated, that, in a proper case, after a legislative divorce, there may be a judicial decree for alimony to the wife;² but this doctrine seems not to rest very clearly either in judicial reason or in authority,³ though the question is not absolutely free from doubt.

§ 360 [556]. The rule of evidence, that the confession of a defendant cannot be accepted as alone establishing the cause against him, in a suit for divorce, has already been considered.⁴ The same rule should probably be applied in the alimony suit, now under examination. For though there may be doubt whether the judgment against the defendant in this suit is sufficient so to establish the marriage that this matter must ever after be deemed *res adjudicata*, the same as in a divorce suit; and though possibly, not certainly, the effect of this decree upon the status of children afterward born may be different from that of a decree of separation from bed and board,—yet, even if there is a difference on these points, the judgment still relates to the same question of marriage or no marriage; of dwelling together by married persons, or living separate; of placing the parties beyond the inducements, at least, to live in actual matrimony, or drawing them closer into this union; whence the rule of esteeming the public to be a party, and therefore of requiring proof of all the facts in issue, has sprung. Yet a case of this kind has been heard on bill and answer alone; where, however, the attention of the court was not directed to the point.⁵

§ 361 [557]. The decree cannot be for a separation, which

¹ Anonymous, 4 Des. 94.

² Crane v. Maginnis, 1 Gill & J. 463; Richardson v. Wilson, 8 Yerg. 67.

³ See post, § 381, 382.

⁴ Ante, § 240 et seq.

⁵ Codd v. Codd, 1 Bland, 101, note. And see Hewitt v. Hewitt, 1 Bland, 101; Wallingsford v. Wallingsford, 6 Har. & J. 485; ante, § 262, note.

would be equivalent to a divorce from bed and board, the court having no power to grant such a divorce;¹ but only for a separate support to the wife, while the parties remain separate.² It is usually expressed, that the husband pay the alimony named therein, till he will agree to take back his wife, and treat her with conjugal kindness and affection.³ Even in a case where the husband was on terms of adulterous intercourse with other women, the final order of the court directed, that he "pay her one hundred dollars per year during the term that they shall live separate and apart, or *until he shall agree to cohabit with her, and treat her as it becomes a man to treat his wife.*"⁴ And an original bill may be maintained to set aside, for proper cause, a decree for alimony.⁵

§ 362 [558]. In one case, the final adjudication provided, that the defendant give bonds to keep the peace toward his wife; and then directed, that he convey certain property to trustees for her use; but this latter part received the consent of his counsel, and the case does not clearly show, whether it would have been ordered, if objection to it had been made.⁶ It seems, however, that, even with the consent of the parties, the court cannot make a valid order out of the common course of its jurisdiction; such as to substitute something else for alimony, like a sale of the husband's lands; and thereby accomplish any purpose which the parties could not reach by agreement, without judicial interposition.⁷ And it has been considered, in Virginia, as plainly it follows from general principles, that the court cannot, on a bill of this kind, make any decree operating upon specific property; it

¹ *Jelineau v. Jelineau*, 2 Des. 45.

² *Anonymous*, 2 Des. 198; *Hewitt v. Hewitt*, 1 Bland, 101.

³ *Rhame v. Rhame*, 1 McCord Ch. 197; *Purcell v. Purcell*, 4 Hen. & Munf. 507. See *Slack v. Slack*, Dudley, Ga. 165; *Head v. Head*, 3 Atk. 547.

⁴ *Prather v. Prather*, 4 Des. 83. This absurdity seems necessarily to result from the fact, that the court has no power to decree a separation. See post, § 374.

⁵ *Whorewood v. Whorewood*, 1 Ch. Cas. 153.

⁶ *Threewits v. Threewits*, 4 Des. 560.

⁷ *Wallingsford v. Wallingsford*, 6 Har. & J. 485. And see ante, § 235.

must be for alimony.¹ It has been held, on the authority of an English decision,² that, if the husband declares an intention to abandon his wife, and to sell the property he got of her by the marriage, and carry off the proceeds, the Court of Chancery will restrain him, and compel him to convey it to trustees for the use of both the parties, with proper limitations.³

§ 363 [559]. The suit for alimony abates with the death of either party. No bill of revivor can arrest this consequence; and, if the wife has neglected to bring her alimony suit against the husband during his lifetime, she cannot, after his death, proceed against his estate in the hands of his executors or administrators.⁴

¹ *Almond v. Almond*, 4 Rand. 662. And see *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Wallingsford v. Wallingsford*, 6 Har. & J. 485.

² *Gardner v. Walker*, 1 Stra. 503.

³ *Greenland v. Brown*, 1 Des. 196.

⁴ *Anonymous*, 2 Des. 198; *Gaines v. Gaines*, 9 B. Monr. 295. And see *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Glenn v. Glenn*, 7 T. B. Monr. 285; *Lawson v. Shotwell*, 27 Missis. 630; *Sackett v. Giles*, 3 Barb. Ch. 204.

CHAPTER XX.

PRELIMINARY INQUIRY CONCERNING THE QUESTION OF COSTS AS BETWEEN THE PARTIES, CONSIDERED IN DISTINCTION FROM ALIMONY.

§ 364. THE general law of husband and wife establishes an identity of interest and condition between the two, the consequence of which is, that neither of them can sue the other. But when, in a matrimonial cause, the law permits the suit to be brought, it must, as a necessary incident, allow also to them a separate existence in respect to all those matters which may be deemed parts of the suit. The legal truth, discussed in a previous chapter, that the wife may have, for the purposes of the suit, a domicile separate from her husband's,¹ is but a single branch of this larger proposition.

§ 365. Another branch of the proposition is, that, in a divorce suit, the wife may recover costs against her husband.² And the doctrine not only holds true as to the main matter, but where, for instance, she applies for an increase of alimony, and prevails, she may have a judgment against her husband for her costs in this proceeding.³ There is, on the other hand, no reason growing out of the identity of the parties, why a husband, prevailing in one of these suits, should not have his judgment for costs against the wife; but, owing to the fact that the joint property is in the hands of the husband, and

¹ Ante, § 124 et seq.

² *Symons v. Symons*, 2 Swab. & T. 435; *Thornberry v. Thornberry*, 2 J. J. Mar. 323; *Kendall v. Kendall*, 1 Barb. Ch. 610; *Graves v. Graves*, 2 Paige, 62; *Germond v. Germond*, 1 Paige, 83; *Stevens v. Stevens*, 1 Met. 279.

³ *Bursler v. Bursler*, 5 Pick. 427.

perhaps for some other reasons also, the court will not ordinarily, if it has any discretion in the premises, decree costs against a defeated wife.¹

§ 366. This is a matter, however, which depends so much upon statutes, and upon peculiar principles of jurisprudence prevailing in different States, that little can be said upon it, of a general nature, and it will not be wise to descend much into considerations of local law. In an Upper Canada case, where the wife sued her husband for alimony² and failed, the husband was nevertheless decreed to pay the costs.³ Likewise in an Alabama case, we have the following language from the learned judge: "It was manifestly improper to render a decree against her [the wife] for costs, in a suit prosecuted against her husband under any circumstances; but, in this case, the court is of opinion that he should have been compelled by the decree to pay the same, as from the admissions of the answer it appears that she had probable cause for instituting her proceedings; although she may not have been able to prosecute the case to successful issue." And it was further observed, that, independently of the husband's admissions in his answer, she might still have had a decree against him for costs, though she failed in her suit.⁴ In Pennsylvania it was held, that, in a divorce suit, the husband when he prevails, cannot be subjected to the payment of costs to his wife. "Costs," said Strong, J., "are of statutory origin. The act of 1815, in its twelfth section, enacts, that the court may award costs to the party in whose behalf the decree or sentence (that is, of divorce) shall pass, or that each party shall pay his or her own costs; but the act does not authorize the imposition of all the costs upon the successful party."⁵ The doctrine in Kentucky also seems to be, that

¹ *De Rose v. De Rose*, Hopkins, 100; *Finley v. Finley*, 9 Dana, 52; *Word v. Word*, 29 Ga. 281; *Wood v. Wood*, 2 Paige, 454; *Reavis v. Reavis*, 1 Scam. 242; *Richardson v. Richardson*, 4 Port. 467.

² *Ante*, § 357.

³ *McKay v. McKay*, 6 Grant, U. C. Ch. 380.

⁴ *Richardson v. Richardson*, 4 Port. 467, 478, 479, opinion by Goldthwaite, J.

⁵ *Shoop's Appeal*, 10 Casey, 233, 235.

the prevailing husband is not liable, under the statute, to have costs taxed against him on the final disposition of the cause, but this point is perhaps not clear.¹

§ 367. We have seen,² that, generally, and aside from the operation of particular statutes, there will not be a judgment rendered against the wife for costs, though she fails in her suit. Yet there are circumstances in which costs will be decreed against the next friend of the wife, where her suit is carried on or defended by a next friend;³ and even circumstances in which, under some forms of the local law, a judgment for costs, it appears, will be made up against the wife herself,—a point not very strong on the authorities.⁴ There is, on the other hand, an Illinois case, in which it was held, that, where a bill brought by a wife for divorce is dismissed, it should not be with costs for the respondent; and Caton, J., observed: “The court [below] by its decree [dismissing the bill and awarding costs against the wife] continued her under the disabilities of a *feme covert*, but subjected her to the liabilities of a *feme sole*. This portion of the decree against her was inconsistent with the position in which she was required to continue.”⁵ In a Georgia case, it was observed by Benning, J.: “The question of costs in divorce cases stands, then, subject to be decided by the common law. And the common law puts alimony, fees to the wife’s counsel, and costs, all on the same footing, and makes the question who is to pay them, depend on the ability to pay them, of the parties respectively. As, however, marriage bestows the wife’s property on the husband, in the absence of a marriage contract, the presumption *prima facie* is, that the husband is the only party able to pay them; and consequently the husband is *prima facie*

¹ *Nikirk v. Nikirk*, 3 Met. (Ky.) 432.

² Ante, § 365.

³ *Mosser v. Mosser*, 29 Ala. 313; *Cornelius v. Cornelius*, 31 Ala. 479; *Ward v. Ward*, 2 Dev. Ch. 553; post, § 409.

⁴ *Eldred v. Eldred*, 2 Curt. Ec. 376, 7 Eng. Ec. 144; *Errissman v. Errissman*, 25 Ill. 136; *Decamp v. Decamp*, 1 Green Ch. 294.

⁵ *Thatcher v. Thatcher*, 17 Ill. 66, 67.

liable to pay them. This he may rebut by showing, that the wife is able to pay them.”¹

§ 368. The view taken by the Georgia tribunal conducts us into the fuller discussion which is to occupy us through several succeeding chapters. Alimony *pendente lite* is not indeed the same thing as costs; neither is the money which the court orders the husband to pay to the wife for the purpose of employing counsel, and the like, the same thing, in our American practice, as are the statutory taxable costs of which we are discoursing in this chapter; but each of these things blends in the other, and it is not easy—at least, it is not practically best—to treat of them separately. This introductory chapter will have its uses in preparing the mind of the reader for what follows.

¹ Word v. Word, 29 Ga. 281, 284.

CHAPTER XXI.

THE GENERAL DOCTRINE OF ALIMONY.

§ 369 [560]. IN some preceding sections,¹ a definition of alimony was given, together with some views concerning it. The doctrine of alimony springs up necessarily out of the soil of our law, by reason of the peculiar property relation which it establishes between husband and wife. Upon the marriage, the husband has vested in him all the present available means of the wife, together with the right to claim her future earnings and acquisitions. At the same time,² the law casts upon him the duty suitably to maintain his wife, according to his ability and condition in life.³ The wife is not under obligation to support the husband, even though she has a separate estate;⁴ yet there are circumstances in which, she having means, and he destitute and unable to earn money, it may be her legal duty to support herself.⁵ The husband can-

¹ Ante, § 351, 352.

² Judge Story observes, that it is only in respect of the husband's duty to maintain his wife, that the law gives him her fortune. 2 Story Eq. Jurisp. § 1419. His duty to maintain her, however, is impaired neither by the fact of his receiving no fortune with her, nor by an antenuptial contract in which each party renounces all right to the property of the other, accruing by the operation of the law upon the marriage. When such a contract exists, the husband is still obliged to alimont the wife, on a divorce, unless her separate estate is sufficient. *Logan v. Logan*, 2 B. Monr. 142, 149. But in the case of such a contract, let it be observed, the wife is still under the general obligation of law to serve her husband; and her earnings, subsequent to the marriage, are his property.

³ *Miller v. Miller*, Saxton, 386; 2 Story Eq. Jurisp., § 1424; *Neil v. Johnson*, 11 Ala. 615. And see Vol. I. § 553 et seq.

⁴ *Methodist Church v. Jaques*, 1 Johns Ch. 450.

⁵ *Wylly v. Collins*, 9 Ga. 223. See Vol. I. § 818. "Nor had he the right to say, that she should earn what she could by her labor, and he would only be answerable

not abandon his duty to support his wife ; therefore, when the law in any case judges that she may live apart from him, for her protection, in consequence of his wrong doing, it must also judge, that he shall maintain her while so living.

§ 370 [560 a]. From the general doctrine mentioned in the last section, we deduce the several secondary doctrines, to be stated in the present series of chapters. But before we proceed with these, let a few general enunciations of legal truth be made ; since they will serve as guides to the reader over the following paths, otherwise apparently a little obscure at some places.

§ 371 [560 b]. When once a marriage is duly solemnized, each of the married parties has acquired certain legal rights, as respects the other, not to be forfeited unless for some breach of matrimonial duty. And when an erring one has broken the matrimonial engagement, the law gives to the innocent party such redress as the nature of the case, and the constitution of the tribunal, allows. Suppose, for example, a husband has committed adultery, the court can neither watch him during all his after-life to prevent his repeating the offence, nor wipe out from his nature the stain which the sin has imparted, nor take off the weight of sorrow from the mind of the wife ; but, if she chooses not to overlook the transgression, it can compel him to do for her what the marriage gave her the right to demand, in the way of pecuniary support.

for the difference between her earnings and the amount of the expense necessary for her support. Such is not the law of husband and wife. The husband must support his wife himself, or pay those who do support her in a reasonable manner." *Cunningham v. Irwin*, 7 S. & R. 247. It seems to me, that neither branch of this statement is precisely accurate. The husband may require his wife to contribute her exertions for the common benefit, according to his pecuniary condition and station, and the customs of the society in which the parties move ; but, when she has done this, her earnings are in law his, and from the common fund he is bound, therefore, not to contribute to her support, but to support her. And see *Prince v. Prince*, 1 Rich. Eq. 282 ; *Callahan v. Patterson*, 4 Texas, 61, 66.

§ 372 [560 c]. Another proposition is, that, while the marital relation subsists in law, the legal rights which the law gives the parties respectively to the property of each other, in the case of survivorship after the death of one of them, remain. And though, in consequence of breaches of matrimonial duty, the deceased one had been divorced from bed and board, still there was no need for the court, on decreeing the divorce, to give, unless it chose, to the innocent one, any support beyond what such one would have received in cohabitation. Yet on the other hand, suppose the court, having a discretion in the premises, went beyond this point, and gave her more, still the excess should be regarded merely in the light of a slight recompense in damages for the injury sustained.

§ 373. The reader perceives, from these views, that this matter of alimony is nearly, if not quite, confined to divorce law. He will, however, do well to look back from this point at some previous sections in which it was discussed, whether alimony could be decreed as appurtenant to a proceeding not of divorce, and especially whether it could be decreed in a suit instituted for its recovery alone.¹ In a New Jersey case it was held, that the court cannot make an order of maintenance to the wife *pendente lite*, on her bill for divorce. It was observed by the Chancellor: "The claim clearly does not fall within the equitable principle which allows to a wife a maintenance during the progress of a suit against her husband. The personal property of the wife is in the husband's hands and under his control during coverture. The wife is presumed to be entitled to support until it is shown that her claim is forfeited. In a controversy with her husband, it is just that she should have the means of enforcing her claim I know of no case in which this claim is allowed except as against the husband himself, and that only as incidental to a bill for divorce or other relief against the husband, except in the case specially provided by our

¹ Ante, § 351 et seq.

statute."¹ The reader will, however, mark the language of this learned tribunal, and see with what exactness of legal logic the doctrine is so laid down as to extend its outer boundary quite beyond the mere region of the divorce suit. Likewise it was ordered in South Carolina, that, pending a suit by a wife against her husband to enforce an agreement to make a marriage settlement, the husband should pay money to her for the expenses of the litigation.² We shall have occasion further on,³ to recur again to this matter by way of illustration; yet it is not proposed any where in these volumes to discuss fully the subject of alimony as pertaining to other suits than those for divorce.

¹ *Rockwell v. Morgan*, 2 Beasley, 119, 120, 121.

² *Wilson v. Wilson*, 1 Dec. 219.

³ Post, § 385.

CHAPTER XXII.

PERMANENT ALIMONY.

§ 374 [561]. FROM what has already been said it follows, that, as a general proposition, a decree for separation, in favor of the wife, must be attended, if she asks it, by a decree for alimony.¹ And upon the same principle rests the better and general doctrine, already discussed,² that no court can grant alimony when it is the only thing sought; because, in the nature of the case, an adjudication allowing the wife to live separate from the husband is a necessary foundation for an adjudication compelling him to pay her a separate support. His ordinary duty is to maintain her in cohabitation with him, not otherwise; and the court cannot adjudge him obligated to do it in separation, until it adjudges that she may live separate. And if it has no jurisdiction over the one question, it can have none over the other; unless possibly³ to decree alimony where a divorce has already been pronounced by some other tribunal. Upon the same principle rests the legal liability of the husband to pay any third person for necessaries which himself has refused to provide;⁴ but here, as the wife is not a party to the suit, the adjudication can extend no further than to control the particular case. And as no decree comes from this suit, giving her any general claim to be supported by third persons at her husband's expense, no need is there of a decree giving her any right to abandon the ordinary duties attendant on matrimonial co-

¹ See *Frankfort v. Frankfort*, 4 Notes Cas. 282; *Poynter Mar. & Div.* 259.

² *Ante*, 352-357.

³ See *ante*, § 359; *post*, § 381.

⁴ See Vol. I. § 553 et seq.

habitation. In short, the doctrine extends through the entire field of our law, as administered alike in the common law, equity, and ecclesiastical tribunals, that, in effect, whenever the wife is adjudged entitled to live separate from the husband, by reason of breaches of matrimonial duty committed by him, a concurring adjudication must be pronounced, that he support her while so living; the one adjudication being commensurate in extent with the other, and neither one existing without the other.

§ 375 [562]. But where, in consequence of a settlement, or otherwise, the property of the wife has been kept in her hands, and has not vested in her husband, and her own estate is fully equal to what she can justly demand from the common fund, the reason for allowing her this kind of support fails, and she is not entitled to it. If her estate is partly adequate, it goes so far to reduce her claim.¹ The same rule applies where a wife has been voluntarily provided, by her husband, with a separate maintenance; if it is adequate, she is entitled to nothing further; if it is not adequate, the court will decree to her such alimony as shall make up the deficiency.² But if, subsequently to the marriage, money has been invested by the relatives and friends of the wife to her sole and separate use, the case seems perhaps to stand upon a somewhat different principle. It has accordingly been held in England, confirmed by the court of last appeal, that, in estimating the amount of alimony to be allowed a wife upon a divorce for cruelty, a deduction from the amount otherwise allowable will not be made in respect of money left by wills, since the marriage, to the wife's separate use. In the same case, the court refused also to make any deduc-

¹ *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195; *Whispell v. Whispell*, 4 Barb. 217; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Logan v. Logan*, 2 B. Monr. 142; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Holmes v. Holmes*, 4 Barb. 295; *Wright v. Wright*, 6 Texas, 29; *Methvin v. Methvin*, 15 Ga. 97; post, § 394. And see *Dixon v. Hufrell*, 8 Car. & P. 717.

² *Gaines v. Gaines*, 9 B. Monr. 295; *Rose v. Rose*, 11 Paige, 166. And see *Coles v. Coles*, 2 Md. Ch. 341.

tion on account of the wife's salary of £500 a year, as a lady-in-waiting to the Queen. The reason of the last refusal, however, was, because the salary was not permanent as a source of income, and because the amount of it was equalled by the expenses of the office entailed upon the possessor. But the Court of Privy Council, overruling the Arches Court, did allow a deduction in respect of a pension of £400 a year, which, during the pendency of the suit, the king had granted the wife.¹

§ 376 [563]. From the foregoing principles it follows also, that no decree for alimony can be based on a decree declaring a marriage void *ab initio*, whether the marriage were a void one, or voidable.² What, in the absence of statutory provisions, would be the duty of a court as to alimony, on dissolving a valid marriage, for the husband's post-nuptial offence, so that the relation of husband and wife would no longer be recognized as existing, is a question which could not arise in the English law as brought into this country by our ancestors; no court in England having had, previous to

¹ *Westmeath v. Westmeath*, 3 Knapp, 42. See *Holmes v. Holmes*, 4 Barb. 295; *Thompson v. Harvey*, 4 Bur. 2177.

² *Godol. Ab.* 508, 509; *Bird v. Bird*, 1 Lee, 621; *Fischli v. Fischli*, 1 Blackf. 360. And see *Bartlett v. Bartlett*, Clarke, 460. The Ecclesiastical Courts, however, on pronouncing such a decree, have given to the woman a specific sum, under the name of costs or expenses of the proceeding. Thus where the husband brought his suit for the restitution of conjugal rights, but failed by reason that the marriage was illegal, whence a decree was made against its validity, Lord Stowell observed: "Under the particular circumstances of this case, in which there is no doubt that a marriage was had freely and voluntarily, and that this affair has been prejudicial to Miss Jones, who is a lady of good character, I shall, agreeably to precedent, give a sum to her *nomine expensarum*, and fix it at 400*l.*" *Scrimshire v. Scrimshire*, 2 Hag. Con. 395, 4 Eng. Ec. 562, 574. Where, however, a wife brought against her husband a suit for nullity of marriage, on the ground of incest, and it appeared the parties were equally guilty, she having been told beforehand the marriage would be illegal, and an endeavor having been made to dissuade her from it, Sir John Nicholl, pronouncing the marriage void, still refused costs to her. *Aughtie v. Aughtie*, 1 Phillim. 201, 1 Eng. Ec. 72. The Chancellor of New Jersey, in *Zule v. Zule*, Saxton, 96, seemed to consider the doctrine stated in the text, not to be fully settled; and raised the query, whether the court, declaring a nullity by reason of a preëxisting marriage, could give alimony; but inclined to the opinion it could not.

the year 1858, jurisdiction to dissolve a valid marriage. Neither could the question often arise in this country; because generally the statutes of the States authorize a decree of alimony, or of division of the property, or both, to attend a divorce dissolving the marriage.¹ But it was held in Massachusetts, where the point was not expressly controverted or discussed, that the court could not, in the absence of direct statutory authority, append a decree for alimony to a decree dissolving the marriage; and such a decree having been entered, and an action of debt² having been brought upon it, the defendant was permitted to take advantage of the error by plea, the judgment for alimony being deemed a mere nullity.³ So, in Pennsylvania, the courts do not, unless by recent statute, allow alimony on the divorce from the bond of matrimony; and, where it has been awarded on a divorce from bed and board, it ceases on a subsequent decree dissolving the marriage.⁴

§ 377 [564]. It moreover follows from these principles, that, where the wife is the offender, she cannot have alimony on a divorce decreed in favor of the husband.⁵ So

¹ See *Fischli v. Fischli*, *supra*.

² The Massachusetts court has since decided, that the proper form of proceeding to enforce a decree for permanent alimony, is *scire facias*. *Morton v. Morton*, 4 Cush. 518. This is a point upon which the practice in the several States differs. And see *Lyon v. Lyon*, 21 Conn. 185; post, § 499.

³ *Davol v. Davol*, 13 Mass. 264. See *Jones v. Jones*, 18 Maine, 308; *Dean v. Richmond*, 5 Pick. 461. But see *Holmes v. Holmes*, 4 Barb. 295; *Crane v. Meginnis*, 1 Gill & J. 463; *Richardson v. Wilson*, 8 Yerg. 67.

⁴ *Blaker v. Cooper*, 7 S. & R. 500; *Smith v. Smith*, 3 S. & R. 248. See post, § 480. See also *Parsons v. Parsons*, 9 N. H. 309; *Tewksbury v. Tewksbury*, 4 How. Missis. 109. In Michigan, alimony is granted, as well on divorces from the bond of matrimony, as on separations from bed and board. *Sawyer v. Sawyer*, Walk. Mich. 48, 53. So it is generally by the statute law of the American States.

⁵ *Godol. Ab.* 508; 3 Bl. Com. 94; *Palmer v. Palmer*, 1 Paige, 276; 2 Chitty Gen. Pract. Am. ed. 462, 463. "This alimony, in strictness of law, being a duty properly due from the husband to the wife during her cohabitation with him, the canon law says, that, if she does, without any default of his, of her accord, depart from him, he shall not be obliged to allow her alimony during such her wilful desertion of him, though she be not charged with adultery, and though he had a considerable dowry with her. But if she departs from her husband through any

long as he has committed no breach of marital duty, he is under no obligation to provide her a separate maintenance ; for she cannot claim it on the ground of her own misconduct. Yet when we look at this point, not in the light of strict legal principle, but in the light of that merciful consideration for human frailty to which the merciful mind is prompted, we are led to the conclusion, that, in some cases, the weight of justice presses too heavily upon the frail woman whom it thus, depriving her of the means of an honest livelihood, forces into prostitution, while she may have repented of her former error, and sought earnestly after the paths of virtue.¹ The English Parliament had a practice, in granting divorces from the bond of matrimony to the husband, of always requiring him to make some provision for his discarded wife.² And Chancellor Walworth, in decreeing, in favor of the husband, a separation from bed and board, on the ground of the wife's cruelty, said he should give her alimony if it were in his power, and recommended the husband to accord it voluntarily.³

§ 378. In New Hampshire it is provided by statute, that, "upon any decree of nullity or divorce, the court may restore

default of his, as on the account of cruelty and the like, then he shall in that case be compelled to allow her alimony, though he had no dower with her ; for the law deems her to be a dutiful wife as long as the fault lies at his door." Ayl. Parer. 58.

¹ So in *Sheafe v. Sheafe*, 4 Fost. N. H. 564, 568, Eastman, J., remarks : "It is not too much to suppose, that there are those who would enter into the marriage relation solely with the view of possessing themselves of the property of their wives ; and who would readily sacrifice their virtue, if by so doing they could break up the marriage contract, and at the same time retain the property of which they had gained possession. Nor is it too much to suppose, that a weak-minded woman might become the victim of an artful and unprincipled husband ; and yet in such a way that it would be impossible to produce any evidence implicating him in her fall. To cast such a woman destitute upon the world would be doing the grossest injustice, and at the same time be rewarding the most infamous iniquity."

² 3 Law Reporter, 219. "And for this most just, humane, and moral reason, that she may not be driven by want to continue in a course of vice." Best, J., in *Jee v. Thurlow*, 4 D. & R. 11, 17. In Massachusetts, under the provincial system, when in a certain instance the governor and council granted to a husband a divorce from his wife for her adultery, they made her no allowance out of his estate. *Gage v. Gage*, 2 Dane Ab. 309, A. D. 1782.

³ *Perry v. Perry*, 2 Barb. Ch. 311.

to the wife all or any part of her lands, tenements, and hereditaments, and may assign to her such part of the real and personal estate of her husband, or order him to pay such sum of money, as may be deemed just and expedient." Upon this it was observed by Bell, J.: "The ordinary course is to allow alimony to the wife, where she is the injured party, and the libellant; but the power of the court is not limited to that case. The wife may be in the wrong. She may have an unhappy temper, or an unfortunate disposition; she may have ill-treated her husband, or deserted him, or have otherwise misconducted herself, and yet the property she may ask as alimony may be all such as was her own before her marriage, or such as has been accumulated, in whole or in part, by her own industry; and her fault may be far from such as ought to be punished by the forfeiture of all her property, or her interest in the husband's property, thus leaving her to beg or starve. She may have so conducted that her husband may be well entitled to a divorce, and yet she may be a wronged and injured woman; and there seems, therefore, to be good reason why the court should be vested with the power of making to her a just and reasonable allowance in any such case."¹

§ 379 [565]. It is not the purpose of the writer to trace here the legislation of our States in detail; but there are several of them in which it is within the discretion of the court to grant some provision to a wife divorced for her fault. Yet we may doubt the expediency of giving, as a general rule, alimony to such a wife; though there are cases in which unquestionably she should have it.² A statute exists in Illinois, authorizing the court which pronounces the divorce dissolving the marriage, to make such order concerning the custody of the children and support of the wife as may seem fit, reasonable, and just; and, in one case, the guilty wife had both alimony and the custody of the only child of the marriage

¹ *Sheafe v. Loughton*, 36 N. H. 240, 243; *Sheafe v. Sheafe*, 4 Fost. N. H. 564.

² See *Fry v. Fry*, 7 Paige, 461, 463; *Fulk v. Fulk*, 8 Blackf. 561.

decreed to her,¹—no bad speculation, if she had become weary of the society of her husband, or had conceived a passion to torment him. There is an Ohio case, wherein alimony was allowed to the defendant wife on a divorce for her adultery; no sufficient evidence appearing of but one criminal act, and there being hope she might be reclaimed. The property of the husband had been earned; after the marriage, by the joint efforts of the two parties. The court said, the wife "must not be turned out to prostitution and starvation."² And in several other States are statutes under which the courts have decided, that the guilty wife, on a divorce, is entitled to alimony, or a share of the husband's estate.³

§ 380 [566]. In Alabama it has been held, that, when a wife sues in equity for a divorce from the bond of matrimony, not claiming alimony of her husband, and he, in his answer, asks for an allowance by reason of his having paid debts of hers contracted before the marriage, this his prayer, thus brought forward, cannot be granted by direct adjudication. If the court could thus attend at all to it, the way of presenting the matter must be by cross-bill. Still, where the husband had made a settlement to the separate use of the wife and her children by a former marriage, the judges would not decree to her the relief she sought, unless she would execute a reconveyance to him of the property embraced in the settlement.⁴

§ 381 [567]. It has been held in Mississippi, that, although the usual practice is to proceed for a divorce and for alimony by one bill, and have them awarded at one time, yet a party need not proceed thus; but, if the question of alimony is not settled in the divorce suit, the wife may afterward sue for it by separate bill, either in the same court, or any other of com-

¹ *Reavis v. Reavis*, 1 Scam. 242.

² *Dailey v. Dailey*, Wright, 514.

³ *Pence v. Pence*, 6 B. Monr. 496; *McCafferty v. McCafferty*, 8 Blackf. 218; *Gaines v. Gaines*, 9 B. Monr. 295, 303; *Richardson v. Wilson*, 8 Yerg. 67; *Lovett v. Lovett*, 11 Ala. 763.

⁴ *Oliver v. Oliver*, 5 Ala. 75.

petent jurisdiction.¹ Concerning this point we may observe, that, without doubt, there is no necessity for the decree of divorce and of alimony to be rendered simultaneously; but there is reason for question, whether, according to the general doctrine, alimony can be granted otherwise than in the suit in which the divorce is pronounced. The better opinion appears to be, that the English chancery has no power to entertain a bill for alimony, as supplemental to a parliamentary divorce; and the Supreme Court of Indiana, with great apparent force of reasoning, maintained, that it could not interfere to give a wife, divorced in Kentucky, alimony out of the husband's lands situated in Indiana, neither could it make a division of them in her favor; although the Kentucky court,² on pronouncing for the divorce, had held, contrary to the current of authority, that it was not authorized to take them into its consideration in assigning to the wife her share of the property. The party, having the right to litigate the question in one suit, could not, the Indiana court considered, bring it forward in another.³ In a like case, however, the tribunals of Ohio would take the jurisdiction by force of a statute; at least, if the bill in Ohio were brought at the same time with the bill for divorce in the other State.⁴ And there may be like provisions elsewhere in this country.⁵

§ 382 [568]. In Tennessee, a man got from the legislature, on petition, a special act divorcing him from his wife, yet containing the provision, that nothing therein should deprive the wife "of her right to alimony, if by law she is entitled to the same." A general statute of the State had already declared, that "it shall be the duty of the court, in making up their decree, to decree to the wife so divorced such part of the real and personal property as they shall think proper,

¹ *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Lawson v. Shotwell*, 27 Missis. 630, 635. And see *Lyon v. Lyon*, 21 Conn. 185; post, § 382.

² *Fischli v. Fischli*, 2 Litt. 337.

³ *Fischli v. Fischli*, 1 Blackf. 360. But see *Crane v. Meginnis*, 1 Gill & J. 463.

⁴ *D'Arasmont v. D'Arasmont*, 14 Law Reporter, 311, 8 West. Law Jour. 548.

⁵ See post, § 382, 492.

consistent with the nature of the case, and shall appoint three freeholders to make partition accordingly." Thereupon she filed her bill for alimony, and she was permitted to recover it. The court considered, that, by the statute last quoted, she was entitled to the alimony, whether she was the guilty or the innocent party, and the court would take up the question where the legislature laid it down, and proceed to the end. The opinion contained also the further intimation, that the same thing would have been done if there had been no such provision in the divorce bill; moreover, that the right of the wife to a support from her husband was a constitutional right, which the legislature could not take away by a divorce bill, passed, as this was, *ex parte*, and without notice to her, even supposing it be effectual as against her to dissolve the marriage itself.¹

§ 383. The proceeding whereby alimony, as appurtenant to a suit for divorce, is to be obtained, — the general course of practice in this matter, — will come up for discussion in a separate chapter. It seemed desirable to the writer of these volumes to preserve substantially, in this fourth edition, the order of discussion which was pursued in the earlier editions, wherein the scope of the discussion was less wide than it is here. And in truth, the various doctrines which pertain to alimony — alimony being but a thing attendant on something else — are of a nature to be nearly as well contemplated in one order as in another. We shall next take a general view of the law of temporary alimony; then we shall consider various doctrines which seem to belong equally to both kinds of alimony; thence proceed, through a sufficient number of chapters, to bring under our review whatever else pertains to the subject.

¹ Richardson v. Wilson, 8 Yerg. 67; Vol. I. § 14; ante, § 358, 381.

CHAPTER XXIII.

ALIMONY PENDING THE SUIT, AND MONEY PAID THE WIFE BY ORDER OF THE COURT TO PROSECUTE OR DEFEND.

§ 384 [569]. WHEN a suit is pending for divorce from bed and board, or from the bond of matrimony, or for declaring a marriage duly solemnized void from the beginning, it is legally improper for the parties to live in matrimonial cohabitation, whatever is to be the result of the suit.¹ Even if the husband offers to support the wife in his own house, with separate beds, she should not accept the offer.² Therefore the single fact, that the suit is pending, is, on principles already laid down,³ alone sufficient to entitle the wife, who has no adequate means of her own, whether plaintiff or defendant, to alimony during its pendency.⁴ It is not ordinarily so while other judicial controversies are going on between husband and wife; for those other controversies do not usually render cohabitation improper, but this controversy always does.

§ 385 [569]. Yet when, for any purpose, whether for divorce or for any other, there is pending such a suit between husband and wife as renders cohabitation improper,—in every such case, according to what appears to be a doctrine

¹ Vol. I. § 801.

² *Sykes v. Halstead*, 1 Sandf. 483. And see *Pinckard v. Pinckard*, 22 Ga. 31.

³ Ante, § 40, 369, 374.

⁴ *Jones v. Jones*, 2 Barb. Ch. 146; *Story v. Story*, Walk. Mich. 421; *Shelford Mar. & Div.* 533, 536; *Wilson v. Wilson*, 2 Hag. Con. 203; *Burrill Law Dict. tit. Alimony*; 2 Chit. Gen. Pract. Am. ed. 463; *Ayl. Parer.* 59; *Oughton*, tit. 206.

of the courts, though not very distinctly laid down, and not very firmly established in precedent where the suit is other than a matrimonial one, — the wife is to have some allowance for her separate support, made her by order of the court, out of the husband's property.¹ Thus, where she was seeking to enforce against him an agreement to pay her a separate maintenance; and he offered and expressed the wish to cohabit with her, but she had exhibited articles of peace against him, and had him under recognizance for good behavior; Lord Hardwicke said, this was "an excuse, at least, for keeping from him for some time, till their passions might be supposed to subside, and they had a prospect, from the interposition of friends, to live happily together;" and so he ordered him to pay her a gross sum, observing: "This is not making a decree, as has been said, before the hearing, but only doing what the husband himself is obliged to do, maintain the wife till the cause is heard upon the merits; and what I say now is abstracted entirely from any decree the court may think proper to make, if there should not then appear to be a foundation for the agreement set up by the bill."² The allowance was not a standing, periodical one, under a general order, as alimony usually is; because it might be proper for the parties, before the termination of the suit, to come together again; whereas, in proceedings for divorce, a reunion can never be proper until the cause is ended. And if this doctrine cannot be laid down as so distinctly established in authority as we might wish, the reason perhaps is, that the cases for its application, outside of the divorce proceeding, are rare.³

§ 386 [570]. As, however, the right to alimony can result only from the marital relation, a fact of marriage between the parties must be admitted or proved, before there can be

¹ See ante, § 373, 374.

² *Head v. Head*, 3 Atk. 295. See also *D'Arusmont v. D'Arusmont*, 8 West. Law Jour. 548, 14 Law Reporter, 311; *Yeo v. Yeo*, 2 Dick. 498; *Dickenson v. Mavie*, 2 Ib. 582; *Perishal v. Squire*, 1 Ib. 31.

³ And see *Collins v. Collins*, 2 Paige, 9.

a decree even for alimony *pendente lite*.¹ So also must the faculties, or ability, of the husband be admitted or proved; this being essential in fixing the amount of alimony.² Yet there are connected with these propositions some questions of practice, to be considered in another chapter. The marriage perhaps need not be so fully proved, or the faculties so exactly shown, in the interlocutory proceeding relative to temporary alimony, as is necessary on a final decree.

§ 387 [571]. Allied in the closest manner to this subject of alimony is the other indicated in the title to this chapter; namely, the sustenance of the wife by the husband in respect of the prosecution or defence of the suit. This sustenance is, in fact, a sort of alimony; the one, being for the defraying the ordinary expenses of the wife in the matter of living; the other, being for the same purpose in respect to the matter of the suit. The husband, who has the control of the money out of which, were the parties dwelling together, the wife would be entitled to draw her support, while the wife is without means which she can herself command, should not only be made to aliment the wife as to her food and the like while the suit is going on, but aliment her also as regards the suit; otherwise she would be denied justice.³

§ 388. In the first volume it was observed, that we should in this other connection consider the question of the wife's

¹ Post, § 402 et seq.; *Miles v. Chilton*, 1 Robertson, 684; *Smyth v. Smyth*, 2 Add. Ec. 254, 2 Eng. Ec. 293; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Durant v. Durant*, 1 Add. Ec. 114, 2 Eng. Ec. 43; *McGee v. McGee*, 10 Ga. 477, 488. It is so also in Scotland. *Campbell v. Sassen*, 2 Wilson & Shaw, 309; *Browne v. Burns*, 5 Scotch Sess. Cas. n. s. 1288; 1 Fras. Dom. Rel. 438.

² *Butler v. Butler*, 1 Lee, 38; *Goodall v. Goodall*, 2 Lee, 264, 6 Eng. Ec. 119; *Thornberry v. Thornberry*, 2 J. J. Mar. 322; *Jelineau v. Jelineau*, 2 Des. 45; *Wright v. Wright*, 3 Texas, 168, 179.

³ *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 338; *Belcher v. Belcher*, 1 Curt. Ec. 444, 6 Eng. Ec. 372; *Story v. Story*, Walk. Mich. 421; *Holmes v. Holmes*, 2 Lee, 90, 6 Eng. Ec. 49; *Fitzgerald v. Fitzgerald*, 1 Lee, 649, 5 Eng. Ec. 472; *Bird v. Bird*, 1 Lee, 572, 5 Eng. Ec. 455; *Daiger v. Daiger*, 2 Md. Ch. 335; *Coles v. Coles*, 2 Md. Ch. 341; *Tayman v. Tayman*, 2 Md. Ch. 393.

power to bind her husband to pay her counsel fees and other like expenses, when she sues him for a divorce, or proceeds against him for a breach of the peace, and other similar matters;¹ for, should it appear, that, when she deems herself compelled to proceed against him in a divorce suit, or to defend a divorce suit brought against her by him, she is not clothed with authority to employ counsel, to summon witnesses, and the rest, on his account, making him answerable for them as for necessities, the rule which requires him to supply her in the divorce suit with the money to pay for these things, will appear the more reasonable and the more important. There is an English case of no very ancient date, in which the proctor of a wife brought against the husband a suit under the following state of facts: "It was proved," says the report, "to be the practice in the Ecclesiastical Courts, during the pendency of a divorce suit, to have the wife's proctor's bill of costs taxed every term, and paid by the husband under a monition, so that the wife's proctor in general gets paid by the husband, whatever be the event of the suit. This course had been pursued in the present case; and the costs were paid in this manner up to November, 1854. In February, 1855, the defendant's wife died, and the suit abated. The action was to recover the amount of the plaintiff's bill from the beginning of November to the time of the wife's death." The divorce suit was one in which the wife was promotor; and, in the proctor's suit before the common-law court, the plaintiff failed to show, to the satisfaction of the latter tribunal, a necessity for the wife to proceed in the former, or a sufficient apparent ground on which to base her cause. "The proctor must show," said Lord Campbell, C. J., "that there was reasonable cause for instituting the proceeding." Therefore he failed to recover. But it was laid down, in the language of Crompton, J., that, "where there is reasonable apprehension of violence, a divorce may be the most effectual protection; and it may be a necessary within the rule which authorizes a

¹ Vol. I. § 584.

wife, who has left her husband from reasonable apprehension of cruelty, to pledge his credit for what is necessary to her."¹ But this doctrine, if it be accepted in the United States as just with us, does not go the full length of meeting the entire demands of the litigation; it is not however, even so far as it goes, the doctrine which most prevails in this country.

§ 389. Thus it was held in New Hampshire, that a husband is not liable to an attorney for professional services rendered his wife in prosecuting a libel for divorce against him upon the ground of adultery,—an offence which could not, in this matter, be distinguished from cruelty, though possibly we might distinguish the divorce from the bond of matrimony, which follows adultery in New Hampshire, from the divorce from bed and board, which follows cruelty in England. Said Bartlett, J., speaking for the New Hampshire tribunal: "It is not sufficient for the plaintiffs merely to show, that the defendant's misconduct gave occasion for the proceedings instituted by the wife, but it must also appear that those proceedings were necessary for the personal protection and safety of the wife."² At the same time, and consistently with this doctrine, the New Hampshire court in an earlier case had held, that, where it is necessary for the safety of the wife to enter a complaint against her husband for a breach of the peace, the legal costs of the proceeding may be recovered against him. And where a wife applied to an attorney, who made out a complaint against her husband for a breach of the peace, which complaint was signed and sworn to by her, and proceedings were had thereon, pursuant to which the husband was, in default of bail, committed to the jail of the county, the husband was held liable to the attorney for such charges as would be good against com-

¹ *Brown v. Ackroyd*, 5 Ellis & B. 819, 827, 829. For more of this case, see post, § 391. And see, as perhaps sustaining this view, *Williams v. Fowler*, McClell. & Y. 269.

² *Morrison v. Holt*, 42 N. H. 478, 480.

plainants in ordinary cases, and upon the ground that the services were necessities furnished to the wife for her protection.¹

§ 390. There seems to be but little judicial difference as to the principle upon which these cases are to proceed. Thus, where a husband had turned his wife out of doors, and she had exhibited articles of the peace against him, and her attorney sued the husband for the recovery of his bill on the wife's retainer about this business, Lord Ellenborough laid down to the jury what may be deemed to be the everywhere received doctrine on the subject, as follows: "If she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might, therefore, charge her husband with the necessary expense of the proceeding, as much as for necessary food or raiment."² The difficulty is to draw the line between cases which fall within this principle, and those which fall outside of it. In the earlier editions of this work, the matter was stated as follows:

§ 391 [571]. If the wife undertakes to sustain any of the expenses of the divorce suit, as to pay counsel, she is not liable on the undertaking, even though a divorce from the bond of matrimony ensues; unless, subsequently to the divorce, she renews her promise of payment.³ Neither is the husband liable to the legal adviser whom she may employ, either in prosecuting or defending a divorce suit.⁴ This at

¹ *Morris v. Palmer*, 39 N. H. 123.

² *Shepherd v. Mackoul*, 3 Camp. 326; *s. p.* *Turner v. Rooks*, 2 Per. & D. 294, 10 Ad. & E. 47.

³ *Wilson v. Burr*, 25 Wend. 386; *Viser v. Bertrand*, 14 Ark. 267.

⁴ *Wing v. Hurlburt*, 15 Vt. 607; *Dorsey v. Goodenow*, Wright, 120; *Shelton v. Pendleton*, 18 Conn. 417; *Coffin v. Dunham*, 8 Cush. 404; *McCullough v. Robinson*, 2 Ind. 630; *Williams v. Monroe*, 18 B. Monr. 514; *Johnson v. Williams*, 3 Greene, Iowa, 97. During the pendency of a wife's bill for divorce, on the ground, among other things, that the husband was a lunatic, an order was made

least is the general doctrine, certainly as applied to divorces from the bond of matrimony. But in a late English case, the proctor of the wife was said by the judges — for he was not permitted to recover under the facts appearing — to be authorized to claim of the husband his fees for prosecuting against him a suit for divorce from bed and board on the ground of cruelty, even though the suit did not succeed, provided reasonable cause existed for instituting it and carrying it on.¹ The case of a divorce suit from the bond of matrimony is different from this; and it, perhaps this also, is unlike the case of the wife's exhibiting articles of the peace against her husband; for there he is holden to her attorney, provided the proceeding was necessary for her safety.² But it is never necessary for her safety *as wife*, either to obtain a divorce from him, or to resist his obtaining one from her.

by the court that he pay her for the support of herself and children \$1,000 per year, until the final settlement of the cause, and execution was issued; but before it was collected he was restored to reason, and the parties came into court and had the bill dismissed. And it was held, that an action of assumpsit would lie against the husband, to recover a sum of money due for the education of the children, on a contract made by the wife, pending the divorce suit. *Harris v. Davis*, 1 Ala. 259. As to the husband's liability for the board of his wife's witnesses, see *Graves v. Cole*, 7 Harris, Pa. 171.

¹ *Brown v. Ackroyd*, 34 Eng. L. & Eq. 214, 217, Lord Campbell, C.J., saying: "A wife has authority to pledge her husband's credit for the costs of a divorce suit where there are reasonable, as well as where there are absolute, grounds for instituting the suit. Under such circumstances the suit would be necessary and fit for the wife's protection, and she would be authorized to employ a proctor, and her husband would be liable for his fees. It has been determined in *Grindell v. Godmond*, that, if the wife indicts her husband for an assault, he is not liable for the costs of the prosecution; and rightly so, because that is not a proceeding for her protection, but for the punishment of the husband. But a divorce *a mensâ et thoro* on the ground of cruelty is a proceeding for her protection; and, as she has no property of her own, she can have no redress unless she is able to pledge her husband's credit. This is just as much a necessary as the costs of exhibiting articles of the peace against her husband are a necessary, as stated by Lord Ellenborough in *Shepherd v. Mackoul*, 3 Camp. 326. The same principle applies in both cases, although the facts which would entitle her to exhibit articles of the peace would not necessarily entitle her to sue for a divorce." And see more of this case, ante, § 388. Compare this case with *Williams v. Monroe*, 18 B. Monr. 514.

² *Shepherd v. Mackoul*, 3 Camp. 326; *Williams v. Fowler*, McClel. & Y. 269; *Turner v. Rookes*, 10 Ad. & E. 47, 2 Bright, Hus. & Wife, 8.

The resemblance in this respect is nearer a criminal prosecution on her behalf against him for an assault, where he cannot be made to pay her counsel fees and other like expenses.¹

§ 392. It is plain, that, whatever be the true doctrine respecting the matter discussed in the last few sections, this doctrine affords no adequate help to a wife proceeding for a divorce, or defending herself against her husband's divorce suit. What she needs, is not merely the right to pledge his credit, or to recover her costs at the end of the suit, it is to use money in the suit, the same as does her husband; it is to stand before the tribunal which administers one law alike to husband and wife, on an equal and common ground with him. And by this primary doctrine of legal reason should all the secondary doctrines relating to the same matter be tested. Let us carry this leading doctrine in our understandings and in our memories, while we proceed to see what secondary rules the courts have laid down.

§ 393. It should be also borne in mind, that the word "costs," which appears in the books in connection with this topic, means something different in the English law upon the subject, from what it means in this country generally. In most of our States the *costs* of a suit are certain fees and expenses which are entered up, in the judgment against the losing party, as a part of the final judgment; but, in the English matrimonial law, the term includes not only this meaning, it extends further also, and signifies those expenses which are to be borne by the husband, among which, and as a part of which, are embraced what in our common law tribunals are called costs.

§ 394 [572]. When the wife has sufficient separate property, the reason for giving her either temporary alimony, or

¹ Grindell v. Godmand, 13 Legal Observer, 467, 1 Nev. & P. 168, 5 Ad. & E. 755, 2 Har. & W. 339.

money to defray her expenses in the suit, does not exist, and she is not entitled to either.¹ The court will consider whether her separate means are sufficient; and, if not, will decree alimony to supply the deficiency. If she has an income adequate to her own support, but not to meet also the expenses of the suit, and she forbears to apply for alimony, but does apply for her expenses, the court will give her the latter.² Sir Herbert Jenner Fust once said: "It would have been much to the satisfaction of the court, if it could have found any case in which the costs have been apportioned between the husband and wife, where the incomes of both parties have been small; but I have never met with a case of the kind, nor am I aware that any such rule ever existed."³ Yet perhaps this is not a precedent which should have weight with us. In cases where the wife is not allowed to claim of the husband her expenses in the suit during its progress, on the ground of her having sufficient separate estate, she may still have her costs as the prevailing party, on its termination, if otherwise entitled to them.⁴

§ 395 [573]. When therefore the wife is carrying on her suit for a divorce, and the husband has no property except what is already in her custody, neither the allowance of temporary alimony nor of money to prosecute the cause can be

¹ Ante, § 375; *Furst v. Furst*, Poynter Mar. & Div. 260, note; *Davis v. Davis*, ib. 261, note; *Fyler v. Fyler*, Deane & Swabey, 175. In New York, alimony *pendente lite* was denied the wife in her suit for separation, where it appeared she had gone to reside with her father, who had agreed with the husband to support her, in consideration of his making no claim for her services. *Bartlett v. Bartlett*, Clarke, 460.

² *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, 3 Eng. Ec. 329, 338; *Belcher v. Belcher*, 1 Curt. Ec. 444, 6 Eng. Ec. 373; *Wilson v. Wilson*, 2 Hag. Con. 203; *Logan v. Logan*, 2 B. Monr. 142; *Collins v. Collins*, 2 Paige, 8; *Holmes v. Holmes*, 2 Lee, 90, 6 Eng. Ec. 49; *Turst v. Turst*, 2 Lee, 92, note, 6 Eng. Ec. 50; *Rose v. Rose*, 11 Paige, 166.

³ *Belcher v. Belcher*, supra. In this case the husband's income was 510*l.* and the wife's 236*l.*, per annum, and she was allowed to tax her costs.

⁴ *D'Aguilar v. D'Aguilar*, supra; *Wilson v. Wilson*, Poynter Mar. & Div. 263, note; ante, § 365.

made her.¹ Yet probably it is not alone a sufficient circumstance to bring a case within this principle, that the husband has no visible or actual estate; for we shall see, that alimony may be awarded out of his income or his ability to earn money.² Where the husband is plaintiff, if he is destitute both of property and ability, the court will not directly require him to furnish the wife with alimony *pendente lite*, or with money to defend, but will suspend the suit until some provision is made for her.³ If he cannot aliment her, and give her the means of defence, he cannot have his divorce.⁴ Where, however, the complainant was an infant without pecuniary resources, and the suit was prosecuted by his father as his next friend, and the defendant wife applied for an order on this next friend to furnish funds out of his own estate for her defence; yet, it appearing from affidavits produced that she was a common prostitute, keeping a house of ill-fame; the court declined either to make the order, or stay the proceedings, until the husband should arrive at full age.⁵

§ 396 [574]. Enlightened by these principles concerning alimony generally, and alimony pending the suit for divorce, let us consider the question sometimes arising in our courts, whether, when a statute gives the tribunal jurisdiction over a specific cause of divorce, but is silent concerning alimony, or provides only for permanent alimony, the temporary can then be awarded; and whether costs, as they are termed in England, or money to defray the expenses of the suit, can also be given. This question seems plain on principle; first, the authority to make the order belongs to the court under the law imported by our forefathers to this country; sec-

¹ *Laurie v. Laurie*, 9 Paige, 234.

² Post, § 446. "The court may also compel him [the husband] to devote a part of his daily earnings to the same object [the support of his wife and family] pending the suit." Chancellor Walworth in *Kirby v. Kirby*, 1 Paige, 261, 262.

³ *Bruere v. Bruere*, 1 Curt. Ec. 566, 6 Eng. Ec. 391; *Walker v. Walker*, 1 Curt. Ec. 560.

⁴ *Purcell v. Purcell*, 3 Edw. Ch. 194.

⁵ *Perkins v. Perkins*, cited in *Osgood v. Osgood*, 2 Paige, 621, 622. And see on the subject generally of this section, *Cason v. Cason*, 15 Ga. 405.

only, if this were not so, still it springs up necessarily out of the legal relation of the parties, and the condition of facts appearing of record before the court to which the application is made. And if any one principle of our jurisprudence is more worthy of commendation than another, it is, that the tribunals may always be pressed to action whenever the case comes within established legal rule, though not within any precedent.¹

§ 397 [575]. Yet the North Carolina court decided, that, as the statute of divorce was silent concerning temporary alimony, and as it contained no intimation of an intention to establish the ecclesiastical practice, this temporary allowance could not be ordered. The court however reserved the further question, whether it would give relief to a husband oppressively pursuing his wife, without means, for a divorce, until he would furnish her with the funds necessary for her defence.² In Vermont, this matter was thus summarily disposed of: "The statute gives this court, which in applications for divorce acts as a court of law, no power to grant alimony, except after divorce granted."³ And in Massachusetts a late case holds, that, until Stat. 1855, c. 137, § 6, expressly conferred the authority on the courts, they could not order this temporary support.⁴

§ 398 [576]. These decisions however are overborne, not only by the judicial reasons involved in the matter, but by the current of American authority also. Thus, temporary

¹ The court in Maine has held, that the alimony which is allowed by a particular statute is incidental to a divorce; so, when another statute provides that a single judge may hear questions of divorce, the result is, that he may hear and pass upon questions of alimony also. *Jones v. Jones*, 18 Maine, 308.

² *Wilson v. Wilson*, 2 Dev. & Bat. 377. In this case Mr. Justice Gaston questioned the policy of allowing temporary alimony. Upon which Chancellor Kent observes: "I am entirely convinced from my own judicial experience, that such a discretion is properly confided to the courts." 2 Kent Com. 99, note. And by Stat. 1852, c. 53, the authority is now vested in the tribunals of North Carolina. *Taylor v. Taylor, Jones*, N. C. 528.

³ *Harrington v. Harrington*, 10 Vt. 505; s. p. *Hasen v. Hasen*, 19 Vt. 603.

⁴ *Shannon v. Shannon*, 2 Gray, 285. And see *Coffin v. Dunham*, 8 Cush. 404, 405.

alimony and money for the prosecution or defence, — things which go together in principle, though differing in name,¹ — one or both, have been awarded by the courts where the statutes were silent,² in New York,³ Michigan,⁴ Kentucky,⁵ New Jersey,⁶ Missouri,⁷ Georgia,⁸ and Maine;⁹ and, in suits

¹ See *Dorsey v. Goodenow*, Wright, 120; *North v. North*, 1 Barb. Ch. 241; *Coles v. Coles*, 2 Md. Ch. 341; *Tayman v. Tayman*, 2 Md. Ch. 393. But in a Rhode Island case, an order for money to carry on the suit was refused, on the ground of former practice, though it was intimated that temporary alimony was allowable. *Sanford v. Sanford*, 2 R. I. 64. And see *Williams v. Monroe*, 18 B. Monr. 514.

² Possibly, in some single instance, I may be mistaken in supposing there was no statutory provision; for I have not access to all the former statutes of every State. The present condition of the statute law of a State does not always indicate what it was upon this subject at a previous date; for not unfrequently the legislature expressly authorizes the courts to grant *ad interim* alimony, though they had before done the same thing without the express direction. Yet the statements in the text are substantially correct, I believe them correct in every instance.

³ *North v. North*, 1 Barb. Ch. 241. This decision is entitled to peculiar weight, because the statute did provide for an allowance to the wife, to a certain extent; but the provision was held not to take away the common law right where the statute was silent. *Mix v. Mix*, 1 Johns. Ch. 108, by Chancellor Kent. Indeed, in New York there is no statute in terms empowering the court to decree temporary alimony, but it is provided, that, in every suit brought either for a divorce or separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency. And it is the constant practice there to decree alimony *pendente lite*, besides making the wife this allowance for the expenses of the suit. 2 Barb. Ch. Pract. 265.

⁴ *Story v. Story*, Walk. Mich. 421. This decision was made in 1844. By the Rev. Stats. of 1846, p. 333, power is given the court to require the husband to pay any sums necessary to carry on or defend the suit during its pendency.

⁵ *Fishli v. Fishli*, 2 Litt. 337, A. D. 1822, the following statutory provision, however, being in force: "Pending a suit for a divorce, the court may make such temporary orders relative to the property and parties as they shall deem equitable." Act of Jan. 31st, 1809, § 8, 1 Littell & Swigert's Statutes, p. 443. In 1831, it was made, by statute, the duty of the husband to provide a support for the wife during the pendency of the suit, unless she was living in adultery. *Whitsell v. Whitsell*, 8 B. Monr. 50.

⁶ *Amos v. Amos*, 3 Green Ch. 171; *Patterson v. Patterson*, 1 Halst. Ch. 389.

⁷ *Ryan v. Ryan*, 9 Misso. 539. On examination of the statute law, as it stood at this time, and still remains, it appears that provision was made for *permanent* alimony; also, that the court "may order any reasonable sum to be paid for the support of the wife, during the pendency of her application for a divorce." Act of March 19, 1835, § 5, compare with act of Feb. 28, 1845. Yet in *Ryan v. Ryan*, which was a suit by the husband, the defendant wife had alimony *pendente lite*.

⁸ *McGee v. McGee*, 10 Ga. 477.

⁹ *Farwell v. Farwell*, 31 Maine, 591.

in equity for alimony, in Virginia¹ and Maryland;² and in Maryland in suits for divorce.³ The same allowance has also been made in New Hampshire, at least to the extent of ordering a sum to be paid the wife for defence against the suit of her husband, on her showing herself to have a good defence, and to be without means.⁴

§ 399 [576]. In Connecticut, the court observes: "When the wife is respondent, and defends herself against the application of her husband, the practice is uniform to order him to provide, in case of her inability, funds for her defence; but we have never known such aid to be furnished her when she was the prosecuting party; nor has she, in such case, though successful, been considered as entitled to recover the costs ordinarily due to the prevailing party."⁵ In Pennsylvania, after a decree had been rendered by the court, fixing the amount of alimony on a divorce from bed and board, the plaintiff moved for a further decree, that the respondent pay her three hundred dollars, expenses incurred in prosecuting her suit. The counsel for the husband opposed the motion, on the ground that no such authority had been conferred by statute. The allowance was however made by the court; and King, President, in giving the opinion, said: "On general principles, independent of the statute, I am convinced that the husband, plaintiff or defendant, is obliged to pay the expenses incurred by his wife in prosecuting or defending a

¹ Purcell v. Purcell, 4 Hen. & Munf. 507.

² Wright's case, 1 Bland. 101, note. This suit was decided in 1730; and the wife had, for her temporary aliment, one hundred pounds of tobacco per month.

³ Ricketts v. Ricketts, 4 Gill, 105; Daiger v. Daiger, 2 Md. Ch. 335; Tayman v. Tayman, 2 Md. Ch. 393; Coles v. Coles, 2 Md. Ch. 341. See Stat. 1841, c. 262, which provides for *permanent* alimony only.

⁴ Parsons v. Parsons, 9 N. H. 309, 319; Quincy v. Quincy, 10 N. H. 272. In a later New Hampshire case, it was however observed by Eastman, J.: "Under our statutes fixing the causes and prescribing the proceedings for divorce, it has not been the practice of the court to allow costs, as such, to either party, except partially in some instances by interlocutory orders. If the wife is the libellant, and prevails, her expenses are usually considered in awarding her alimony." Morris v. Palmer, 39 N. H. 123, 128.

⁵ Shelton v. Pendleton, 18 Conn. 417.

divorce; and certainly he is so obliged when, as here, she has established her claim to it. It is an incidental authority to the power given this court to decree a divorce. Without it, in many cases, the wife being in poverty must fail in a just suit instituted by her, or be defeated in an unjust one prosecuted by her husband against her."¹ And the doctrine of allowing temporary alimony is fully approved in this State.²

§ 400 [577]. The principle is, as we have seen,³ that the wife's right to alimony *pendente lite*, and to money to carry on the suit, to be paid by the husband, grows out of the nature of the proceeding. It can therefore make no difference, whether the court is one of law or of equity; but, as in the United States the equity tribunals have more generally this jurisdiction, the question has more frequently arisen in them. Indeed seldom, in legal proceedings, do rights depend upon the judicatory, provided it has power over the subject-matter; for what is lawful and just before one set of judges must be so before another. And in the Georgia tribunal, which hears divorce causes as one of law, not of equity, Nisbet, J., in a luminous opinion, observed: "Alimony *pendente lite* is a common law right. It was an established right in England when we adopted the common law. It is no less a common law right because it grew up under the usages of the Ecclesiastical Court. What becomes of that right in Georgia? The common law which guarantees it, has not been repealed. It is suited to our condition, and in harmony with our institutions. We have no ecclesiastical court. The jurisdiction, which in England belonged to that court, has been transferred here, by statute, to the superior courts, and the manner of exercising it pointed out. Upon the subject of temporary alimony, however, our statutes are silent. Under this state of the facts, I repeat the question, what becomes of the right?"

¹ *Meliset v. Meliset*, 1 Parsons, 78. And see *Butler v. Butler*, ib. 329. See also the Alabama cases of *Richardson v. Richardson*, 4 Port. 467, 480, and *Harris v. Davis*, 1 Ala. 259.

² *Graves v. Cole*, 7 Harris, Pa. 171.

³ *Ante*, § 369, 374, 384-386, 396.

Is it a right without a remedy? Or rather, are not the superior courts bound to enforce it as much as any other provision of the common law? By transferring the jurisdiction over divorces to those courts, was it not the intention of the legislature that that jurisdiction should be exercised, except so far as the manner of its exercise is specially prescribed, and except so far as the common law is in conflict with the laws of Georgia, and the genius of her institutions, according to the common law? We think it was; and that, with the power to grant divorces, passed the power to enforce the common law which gives to the wife temporary alimony. This conclusion becomes irresistible when we reflect, that, if the Superior Court cannot make the provision, it cannot be made at all."¹

§ 401 [578]. The allotment of temporary alimony is really for the benefit as well of the husband as the wife, especially in those cases where he is the guilty party. If no such allotment has been made, he is liable, at law, for necessaries furnished her during the pendency of her suit for divorce, the same as though it was not pending.² Liable likewise is he, if he has not paid the alimony decreed;³ and where, in consequence of his neglect to pay, he has been compelled to

¹ *McGee v. McGee*, 10 Ga. 477, 485.

² *Keegan v. Smith*, 5 B. & C. 375; *Sykes v. Halstead*, 1 Sandf. 483; *Cunningham v. Irwin*, 7 S. & R. 247. If the parties are living apart, whether with or without an agreement to do so, and her suit against him for his alleged desertion is pending, her offer, made in good faith, to return to him, will be presumed to include an offer also to withdraw the suit for divorce; and will, moreover, without resorting to the desertion alleged therein, be sufficient to charge him with necessaries furnished her by a third person. *Cunningham v. Irwin*, 7 S. & R. 247.

³ *Hunt v. De Blaquiere*, 5 Bing. 550; *Keegan v. Smith*, *supra*. The same rule applies where an allowance made in a deed of separation is not paid. *Nurse v. Craig*, 5 B. & P. 148; *Burrett v. Booty*, 8 Taunt. 343; *Miller v. Miller*, Saxton, 386, 392. But where the parties are living separate, without deed or sentence of court, the husband will not be relieved from his liability for necessaries furnished her by third persons, in consequence of paying her an allowance voluntarily; unless it is adequate, of which the jury are to judge. The mere acquiescence of the wife will not establish its adequacy. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Willson v. Smyth*, 1 B. & Ad. 801; *Baker v. Barney*, 8 Johns. 72. But see Vol. I. § 580. See also *Fenner v. Lewis*, 10 Johns. 38.

discharge debts contracted by her, his only remedy is to apply for a reduction of the alimony.¹ But if he has regularly paid it, he is relieved from all further responsibility.² Yet even then, if the debt were properly contracted during the pendency of the suit, but before the decree of temporary alimony, he would still be obliged to discharge it, although the decree should direct the alimony to commence from a date previous to the time when it was contracted; for the rights of third persons, already accrued, cannot be taken away by proceedings to which they are not parties.³

§ 402 [579]. We have seen, that this right to temporary alimony grows out of the marriage relation, under the circumstances in which the parties litigant are placed. Therefore, as also we have seen,⁴ the allowance cannot be made until a fact of marriage has been either admitted or proved. But the marriage need not be legal and valid; for, though it is void in law, yet if it has operated practically upon the property rights, the same as though it were valid, the same reason exists for making the temporary provision. Suppose, for instance, a woman of wealth has married a poor man, making him wealthy; and finds herself, considered separate from her husband, poor. Yet suppose she has learned, that this man has already another wife living, and so the marriage is void. She may indeed treat it as void without a judicial sentence; yet suppose, that, instead of this, she brings her

¹ *De Blaquiere v. De Blaquiere*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 128. And see post, § 425, 429-434; *Hancock v. Merrick*, 10 Cush. 41.

² *Willson v. Smyth*, 1 B. & Ad. 801; *Bennett v. Stokes*, 2 Misso. 69; *Brisco v. Brisco*, 2 Hag. Con. 199. In the case last cited, where the conduct of the wife had been bad, Lord Stowell observed: "Under all these circumstances, where enormous expenses are thrown upon the husband in every mode to which female extravagance can apply itself, if the court did not feel that by ordering alimony it was most consulting the protection of the husband, it would hardly be disposed to allot any alimony at all. Under all considerations, however, the court allots the sum of 200*l.* per annum, in addition to the sum of 200*l.* per annum pin money." And see 1 *Fras. Dom. Rel.* 441.

³ *Keegan v. Smith*, 5 B. & C. 375; 2 *Bright. Hus. & Wife*, 19.

⁴ *Ante*, § 386.

suit against the man to have it decreed null. Her property is practically in his hands, though in point of law she retains the title. But since she has elected to let the court settle the question of nullity in a direct proceeding for this purpose, she has the same claim upon the court to have appropriated to her so much of this property as her necessities demand while the suit is going on, as though she alleged the marriage to be valid, and sought its dissolution for a cause occurring subsequently to the nuptials. In like manner, where the man seeks to establish the nullity of his marriage on the allegation that the woman has a former husband living, she may have alimony pending the suit, and money to defend. This question having arisen before Sir George Lee, he observed: "The man by his suit admitted, that he was married to her *de facto*; and it was alleged and not denied, that he had lived with her as his wife for many years, and had eight children by her; and, under that marriage, he had a right *jure mariti* to possess himself of whatever she had, and must be supposed to have done so, and consequently she could have no money of her own to defend herself against his suit. I must presume, till the contrary appears in evidence, that she was his wife *de jure*, as well as *de facto*; for otherwise she must be guilty of bigamy, and is a felon; but the law presumes, on the contrary, everybody to be innocent till they are proved guilty."¹ The practice here indicated has prevailed ever since this decision, and it applies both to temporary alimony and to money to defray the wife's expenses in the cause.²

¹ Bird v. Bird, 1 Lee, 209, 5 Eng. Ec. 366.

² Miles v. Chilton, 1 Robertson, 684, 693; North v. North, 1 Barb. Ch. 241. And this is so, even though it is alleged that the marriage was brought about by the fraudulent practices of the supposed wife, and though the costs of the suit may ultimately be awarded against her. Portsmouth v. Portsmouth, 3 Add. Ec. 63, 2 Eng. Ec. 428. The Georgia court decided the other way in Roseberry v. Roseberry, 17 Ga. 139; but, in the subsequent case of Frith v. Frith, 18 Ga. 273, the judge said, the court, "went too far" in the former case, and I presume the former is intended to be thereby overruled. Indeed Frith v. Frith directly decides, that, when the husband seeks a decree of nullity against the wife on the ground of the marriage having been brought about by her fraud, she may have temporary alimony.

§ 403 [579]. Chancellor Walworth, however, has intimated an exception to this rule; being the very case put by way of illustrating it, in the opening periods of the last section; namely, that, where the woman is plaintiff in a suit for nullity, her own allegation of the defect in the marriage will be taken against her as true, when she applies for temporary alimony and money to prosecute the suit, wherefore she will not then be entitled to the allowance.¹ But on principle, though undoubtedly she must be bound by her allegation,² we saw in the last section, that, even when the marriage is void, she should still have her temporary alimony. *A fortiori*, when it is voidable, as for impotence, her allegation shows precisely the same foundation for alimony as if it were originally without defect; namely, that all her property has lawfully vested in the husband, and that he has become entitled to receive her earnings. If indeed, in the case of a void marriage, the parties had held themselves out as husband and wife merely for purposes of their own, the marriage not having operated practically on their mutual property rights, the reason for giving alimony would not exist, and it should not be allowed.³

§ 404 [580]. There is a New York case, in which the wife, in her bill for divorce from bed and board for the husband's cruelty, alleged a marriage in time and place, and swore to the bill; the husband, in his answer, sworn to also, denied the marriage, but did not deny the cohabitation; whereupon Vice-Chancellor McCoun made the allowance of temporary alimony, and of money to carry on the suit, observing: "A novel question is presented here. Although the

¹ North v. North, 1 Barb. Ch. 241. So in Bartlett v. Bartlett, Clarke, 460, it was held, that, in a suit by the wife for a divorce because of the husband's alleged impotence, she could not have an allowance of money for carrying on the suit. The decision appears to have been based chiefly upon the statute; yet, even in this view, there is certainly room to question its harmony with principles elsewhere established.

² Vol. I. § 117.

³ Browne v. Burns, 5 Scotch Sess. Cas. n. s. 1288; Campbell v. Sassen, 2 Wilson & Shaw, 309.

defendant denies a marriage *de facto*, he has not denied the cohabitation, or living together, nor the great cruelty set forth in the bill: At this stage of the suit, I do not think the plea sufficient to prevent the granting of the application. In *Smyth v. Smyth*, 2 Addams, 254, the court in effect granted temporary alimony, where in point of form it could not allot it to the wife until the fact of marriage was either proved or confessed by the husband.”¹ In the case of *Smyth v. Smyth*, the facts were, that the libel as reformed was admitted on the day immediately preceding a long vacation; and the court, being asked for alimony, said the allotment could not be made in form, because neither the marriage had been shown, nor the husband’s faculties established; yet recommended the husband in effect to aliment the wife, in proportion to his means, during this vacation, “intimating, that it should take this into the account, when, in the progress of the suit, alimony *pendente lite* came to be *regularly* allotted, if its recommendation were not complied with.”²

§ 405 [580 *a*]. If we look again at the principle on which this temporary allowance is made, we shall see the exact statement of the case to be, that, before the making of the allowance, the judge should be satisfied, either from testimony taken or from the admissions of the parties, of such terms and relations practically existing between them, in respect of their pecuniary affairs, as ordinarily exist between married persons. If these terms and relations do exist, then the allowance out of the common fund is to be made to the wife, equally whether she is wife *de jure*; or, till the suit is determined, is merely wife *de facto*, to cease, on its termination, to be wife at all.

§ 406 [581]. The *ad interim* alimony and money to sus-

¹ *Smith v. Smith*, 1 Edw. Ch. 255.

² *Smyth v. Smyth*, 2 Add. Ec. 254, 2 Eng. Ec. 293. See observations of Dr. Lushington on this case, in *Miles v. Chilton*, 1 Robertson, 684, 693. See also *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Fraser v. Fraser*, Poynter Mar. & Div. 248, note.

tain the expenses are given, not as of strict right in the wife, but of sound discretion in the court.¹ Yet the discretion is a judicial, not an arbitrary, one.² And when a case is brought within the principles recognized as entitling the wife to the allowance, the allowance follows pretty much as of course, without inquiry into the merits of the case.³ If, for example, she is plaintiff, it is no objection that the husband denies her charges under oath;⁴ or, if she is defendant, that he has recovered, in an action of criminal conversation, a verdict against the alleged paramour.⁵ Even where, in the divorce suit against her, the jury on a feigned issue have found a verdict in his favor, the alimony still continues down to the time of the final decree.⁶ But the pleadings which she herself presents must show merits;⁷ and, if her bill is in form or substance sufficiently defective to be bad on demurrer, as where she sues in her own name when she should sue by her next friend, she cannot—so it was held in the former New York Court of Chancery—have the allowance.⁸ In one case, the question of the jurisdiction of the court being raised by the defendant husband on demurrer, the judge would not order him to pay her a sum for carrying on the suit until this question should be settled; but, it further

¹ *Jones v. Jones*, 2 Barb. Ch. 146; *Mix v. Mix*, 1 Johns. Ch. 108; 1 Fras. Dom. Rel. 441; *Swearingen v. Swearingen*, 19 Ga. 265.

² *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178.

³ *Wright v. Wright*, 1 Edw. Ch. 62; *Jones v. Jones*, supra; *Hammond v. Hammond*, Clarke, 151; *Methvin v. Methvin*, 15 Ga. 97; *Daiger v. Daiger*, 2 Md. Ch. 335; *Coles v. Coles*, 2 Md. Ch. 341.

⁴ *McGee v. McGee*, 10 Ga. 477, 489; *Hammond v. Hammond*, supra.

⁵ *Williams v. Williams*, 3 Barb. Ch. 628.

⁶ *Stanford v. Stanford*, 1 Edw. Ch. 317; *Germond v. Germond*, 1 Paige, 83.

⁷ *Worden v. Worden*, 3 Edw. Ch. 387; *Ballentine v. Ballentine*, 1 Halst. Ch. 471; *Jones v. Jones*, supra; *Browne v. Burns*, 5 Scotch Sess. Cas. n. s. 1288. See post, § 423.

⁸ *Rose v. Rose*, 11 Paige, 166; *Wood v. Wood*, 2 Paige, 454; s. c. decided on appeal in the Court of Errors, 8 Wend. 357. The Vice-Chancellor granted temporary alimony, notwithstanding the husband had appealed to the Chancellor from an order allowing the sufficiency of the next friend. *Robertson v. Robertson*, 1 Edw. Ch. 360. See also *D'Arusmont v. D'Arusmont*, 14 Law Reporter, 311, 8 West. Law Jour. 548. And see ante, § 402. But see, as perhaps variant from the doctrine of the text, *Coles v. Coles*, 2 Md. Ch. 341.

appearing that, if the bill should not be sustained as a bill for divorce, the court would still have jurisdiction over it for the purpose of providing for the suitable support of the wife and children out of the husband's estate, pursuant to a statutory provision, *ad interim* alimony was granted.¹ Drunkenness in the plaintiff wife will not of itself take away her right to an advance of money to carry on her suit, and temporary alimony. But the court, before giving her the alimony, will take care it shall not be misapplied.²

§ 407 [581 a]. Some recent cases, however, seem to qualify a part of the doctrine of the last section; though, it is submitted, the part thus apparently qualified ought to stand as there stated. Thus the New Jersey court seems to have looked into the case, on affidavits concerning its merits, in respect of the matter of alimony *pendente lite* and counsel fees.³ In another New Jersey case, the defendant husband had been declared in another proceeding a lunatic, and the wife then applied for the temporary alimony. The learned Chancellor rejected the application, saying: "I think it would be improper to make the order. It would be made against a party who has been declared a lunatic by this court. The order implies a default and neglect of a moral obligation on the part of the defendant. This ought not to be imputed to a lunatic. The embarrassment in enforcing such an order is also an objection to making it."⁴ As to the former of these two adjudications, let us observe, that, not only is the receiving of affidavits concerning the merits of a cause contrary to the general practice,⁵ but the practice, if established, will require the court substantially to pass twice on the same question, contrary to the usual course of things, and will thereby unnecessarily burden both the wife and the court,

¹ *Mix v. Mix*, 1 Johns. Ch. 108; see *Turrel v. Turrel*, 2 Johns. Ch. 391; *Ex parte King*, 27 Ala. 387.

² *Saunders v. Saunders*, 2 Edw. Ch. 491.

³ *Dougherty v. Dougherty*, 4 Halst. Ch. 540; see also *Martin v. Martin*, 4 Halst. Ch. 563; post, § 409, note.

⁴ *McEwen v. McEwen*, 2 Stock. 286.

⁵ Ante, § 406; post, § 423.

while it will delay the supply of her needs unduly. As to the other matter, if a proceeding is carried on at all against a lunatic, no reason appears why his property, if he has property, should not as well pay the expenses, as well support the wife also, as though he were not a lunatic; and the person who has it in possession should be directed to disburse. If, however, in any case the court has suspicion that the wife is not herself directing her cause, but that it is carried on by others without her direction, very important is it for this matter to be determined before an order is made for the temporary alimony.¹

§ 408 [582]. The former court of chancery in New York refused to the defendant wife her advance to defend the suit, and her temporary alimony, until her answer had disclosed the nature of her defence.² And when it consisted in a denial of the adultery charged, she was required to make oath to it, in order to obtain this allowance; though she was not, for any other purpose, obliged to answer under oath. But when she answered under oath, the answer was held to be, for the purposes of the application, conclusive.³ Yet since a wife might successfully resist the suit without denying her guilt; as, by showing, in recrimination, that her husband was guilty also; if she set up such a special defence upon her information and belief, she, of course, could not give it the weight of her own affidavit, but it seems she must support it by affidavits of witnesses, before she could have the allowance.⁴ The legal propriety of requiring the answer on oath, and the affidavits of witnesses, is matter for consideration a little further on.⁵

§ 409 [583]. Moreover, in New York, a distinction in this question was taken between bills for the dissolution of the

¹ *Swearingen v. Swearingen*, 19 Ga. 265.

² *Lewis v. Lewis*, 3 Johns. Ch. 519; *s. r. Allen v. Allen*, Hemp. 58.

³ *Williams v. Williams*, 3 Barb. Ch. 628; *Osgood v. Osgood*, 2 Paige, 621; *Wood v. Wood*, 2 Paige, 108; ante, § 406.

⁴ *Osgood v. Osgood*, supra.

⁵ Post, § 423.

marriage, and bills for a separation from bed and board. Thus, while in a suit for the dissolution of the marriage the wife was entitled to her allowance as of course, if she had properly set forth upon her oath a legal ground of action or defence; yet, in suits for a separation only, if the parties had severally presented, each upon oath, a good case, and a strong impression was on the whole left in the mind of the court that the husband was the more injured one, the wife could not have the allowance unless she further satisfied the court of the merits of her cause.¹ This modification of doctrine, in their application to the divorce suit from bed and board, is not quite in harmony with what is held in England, and generally in the other American States.² The New York rule was drawn from the peculiar legislation of the State, which provided, that the suit by the wife for separation, unlike the suit for a dissolution of the marriage, should be brought through a responsible person as her next friend,³ who should be answerable to the defendant for the costs he might be put to by the commencement and prosecution of it, if it should eventually be found to have been instituted without sufficient reason. And a needless burden would be cast on the husband if he were compelled to advance money to the next friend, who must ultimately refund it with interest.⁴ But the new Code of procedure in this State at first authorized the wife to sue for the limited, as for the full, divorce, in her own name alone; yet it was afterward amended, and a next friend became requisite, whether she was suing or defending, and whether the divorce sought was from bed and board or from the bond of matrimony.⁵ Afterward the Code

¹ *Bissell v. Bissell*, 1 Barb. 430. And see *Worden v. Worden*, 3 Edw. Ch. 387; *Hollerman v. Hollerman*, 1 Barb. 64. And compare with *Osgood v. Osgood*, 32 Paige, 621. See also *Jones v. Jones*, 2 Barb. Ch. 146; *Snyder v. Snyder*, 3 Barb. 621, 624.

² See *Portsmouth v. Portsmouth*, 1 Add. Ec. 63, 2 Eng. Ec. 428.

³ See ante, § 302-304.

⁴ Chancellor Walworth in *Jones v. Jones*, supra; *Laurie v. Laurie*, 9 Paige, 234.

⁵ *Shore v. Shore*, 2 Sandf. 714, 8 N. Y. Legal Observer, 166; *Maldora v. Maldora*, 4 Sandf. 721; *Thomas v. Thomas*, 18 Barb. 149; *Voorhies* N. Y. Code, 2d

was again altered, and a next friend became in none of these cases necessary. Whether there has been another alteration still, the author does not deem it worth his while to examine, or encumber these pages with stating.¹

§ 410 [584]. Where the wife's bill for divorce is taken *pro confesso* against her husband, she may have a reasonable counsel fee taxed in her costs, as well as *ad interim* alimony.² But where she is defendant, and suffers the bill to be taken *pro confesso* against her, she is not entitled to costs, even though the bill is dismissed for want of proof, and she cannot have an allowance of money to defend the suit; for, as against her, the husband's allegations must be deemed true; and all further inquiry is merely to satisfy the court of just cause existing, and no collusion.³

ed. § 114, and notes, 4th ed. p. 101. See also *Wood v. Wood*, 8 Wend. 357. It is the practice, sometimes at least, in Ohio, for the wife, on asking alimony, to bring in affidavits of witnesses taken on notice, showing a *prima facie* case. *Edwards v. Edwards*, Wright, 308; *Wooley v. Wooley*, Wright, 245; *D'Arusmont v. D'Arusmont*, 8 West. Law Jour. 548, 14 Law Reporter, 311. Mr. Page says: "In Ohio, the application for temporary alimony is generally founded on a motion to the court. Reasonable notice of the motion is given to the husband, and affidavits are presented to show the fact of marriage, the separation, the cause of the application, and the condition of the husband in life. These affidavits are also taken upon notice." Page on Div. 270, referring to the above-cited cases from Wright, and to *Martin v. Martin*, Wright, 104, I will observe in passing, — it not being my intention to go into the question of practice here, — that this method can hardly be taken with safety as a guide elsewhere. See also *Slack v. Slack*, Dudley, Ga. 165; *McGee v. McGee*, 10 Ga. 477; *Wright v. Wright*, 3 Texas, 168; *Longfellow v. Longfellow*, Clarke, 344; ante, § 487; post, § 423, &c.

¹ The second edition of this work contained a statement of the first provision of the Code, and of the next subsequent alteration. When the third edition was being prepared, no reported cases presented themselves showing a further alteration; so the section was printed in the third edition as it stood in the second. But a legal gentleman of New York kindly pointed out to me, when too late to make the correction, that I had failed to give the law as it stood last amended. This instance illustrates both the folly and the uselessness of attempting, in a legal work intended for circulation in all the States, to keep pace with the fluctuating statutes. Either the author will succeed in such an attempt, or he will not: if he succeeds, his page will become so loaded with such matters that every practitioner will turn from it to his own statute books; if he fails, his attempt is a *fortiori* useless.

² *Graves v. Graves*, 2 Paige, 62.

³ *Perry v. Perry*, 2 Barb. Ch. 285. And see *Graves v. Graves*, supra; ante, § 236, 406.

§ 411 [585]. Where, in New York, the husband has made, under an order of court, an advance of funds to the wife to carry on her suit, if she prevails, her taxed bill of costs against him is to be reduced by deducting therefrom the amount of the allowance thus made her, less the reasonable sum which she may have paid for counsel fees and other expenses not covered by the taxed bill.¹ This equitable rule prevents the wife from making any speculation out of the advance. The general doctrine is, that the husband is to pay the wife, besides the temporary alimony, her actual and reasonable expenses in the suit, but no more. And it was admirably laid down in a Scotch case, that "the taxation of the accounts must be as between agent and client, with this material qualification, that the agent is to be held as acting without special instructions, and therefore liable for the propriety and reasonableness of his proceedings."² If a wife, wantonly and without probable cause, introduces into her pleadings matter she cannot prove, this may be ground for disallowing her claim in part, though she succeeds in her suit; but the mere fact of her having failed to prove a particular part of her allegation is itself not sufficient for this purpose.³

§ 412. There are some decisions by the present Matrimonial Court of England, from which useful light may be gathered. Thus, it is laid down in one case, that the wife's costs are not taxed, in these cases, on the same principles as in suits at the common law. For example, if there are several issues at common law, the prevailing party cannot have costs taxed on those issues wherein he fails; but it is otherwise in divorce cases. And Cresswell, J., observed: "The question of the principle on which costs are to be taxed in matrimonial suits has not yet been settled; but I apprehend that I must adopt, as far as I can, the principles on

¹ *Kendall v. Kendall*, 1 Barb. Ch. 610.

² *Taylor v. Binnie*, 4 Deas & Anderson, 314, 10 Scotch Sess. Cas. 18. And see *Soules v. Soules*, 3 Grant, U. C. Ch. 113.

³ *Soilleux v. Soilleux*, 1 Hag. Con. 373, 4 Eng. Ec. 434. And see *Dorsey v. Goodenow*, Wright, 120.

which the Ecclesiastical Courts proceeded. I am informed that the principle of taxation in those courts was as between party and party; but that term had a very different construction from that put upon it in common-law courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs. I think that the only limit which can with propriety be put upon the allowance of the costs of the different issues raised in this court is this: where the taxing officer is satisfied that an issue has been vexatiously and improperly put on the record, so as to occasion a wanton and unnecessary increase in the amount of costs, he is not to allow the costs of that issue." And the same rule was deemed to apply to the number of witnesses; costs were to be allowed for such witnesses of the wife as were brought to court in good faith. And upon the matter of the witnesses' expenses the learned judge observed: "There is the question of the expense of taking witnesses to Paris, for the purpose of giving evidence as to identity and handwriting. In the common-law courts the expenses incurred by witnesses in obtaining information are not allowed. If a witness makes a journey to learn something, he is not allowed the expenses of his journey. I have inquired whether the same principle was applied to the taxation of costs in the Ecclesiastical Courts, and I am told it was not, but that where a journey to procure information was necessary to prove the case, the cost of the journey was allowed as a necessary expense for the wife. I think a reasonable amount should be allowed for those expenses. If the registrar [who is the taxing officer], in allowing fifty guineas for instructions for the brief, included those expenses, he will probably not allow any thing more, but it is a matter for his discretion."¹

§ 413. In the Ecclesiastical Court, the general rule was to permit the wife to have two counsel—there were to be two counsel on a side—and to make her an allowance out

¹ *Allen v. Allen*, 2 Swab. & T. 107, 110, 111.

of her husband's funds for the payment of the two, but no more. And where, in one case, the proctors had agreed between themselves that there should be but one counsel on a side, the court, under the particular circumstances of the case, held the wife not to be bound by the agreement, and permitted her to have two, at the husband's charge.¹ In a case before the new Matrimonial Court, the question coming up at the end of a suit in which the wife had prevailed, and the bill of costs presented on her behalf to the registrar for taxation having amounted to £361 4s., which by this officer was cut down to £265 16s. 7d., from which taxation both parties appealed, the costs of employing three counsel for her were allowed by the court. "I have endeavored," said Cresswell, J., "to ascertain the principle on which the wife's proctor's costs used to be taxed; I find that it is the same as in other cases; and that no distinction was made because the husband has to pay the costs on both sides. It is true, that, under the old practice, two counsel only would have been allowed; but, where the evidence is given orally in open court, this principle is inapplicable; there are not only a party's own witnesses to be examined, but the witnesses of the other side to be cross-examined. As to this particular case, it lasted half Friday, all Saturday, and till late on Monday." Yet he refused to allow also the expenses of a country attorney to be added to those of the city one.²

§ 414. In another case, where the question came up on the taxation of the wife's costs during the pendency of the suit, the learned judge refused to allow any thing for what had been done before the suit was actually undertaken; for instance, he confirmed the registrar in rejecting, says the report, "various expenses in taking opinions and advice previous to 'the instructions for a petition.'" Moreover, various items for attendance on the petitioner's father were disallowed; Cress-

¹ *Money v. Money*, 1 Spinks, 117.

² *Suggate v. Suggate*, 1 Swab. & T. 497.

well, J., observing: "I find that it would be quite contrary to the practice of the Ecclesiastical Courts to allow for attendance on any one except the party herself. It would appear from the aspect of the bill, that Mr. Weller [the wife's father] taking a natural interest for his daughter in the suit, looked into the attorney's office whenever he passed that way, and talked matters over;" but the attorney's bill, for this talking, the judge declined to compel the husband to pay.¹

§ 415. These several cases will illustrate the proposition, that, in this court, the husband is to pay the full amount required to meet the actual expenses of the wife, conducting her cause in good faith, with ordinary prudence, and according to the usages of the court and of the legal profession with whom she has to deal. Where a plea of condonation was brought forward by the defendant wife, but this matter, so far from being proved, was actually abandoned by her counsel at the hearing, the husband was still compelled to pay her proctor's expenses incurred upon this plea. "It is difficult," said the Judge Ordinary, "to draw the line in such cases, and a proctor refusing to bring before the court any defence set up by his client, and not plainly unfounded, would incur a very grave responsibility, and therefore I think the costs must be allowed, although I cannot doubt that there was a miserable conspiracy to entrap the husband into a position which might be urged as evidence of condonation."²

§ 416: These cases also illustrate another proposition; namely, that the question is precisely the same whether it comes up in the course of the proceedings upon an application in behalf of the wife for money to help her to carry them on, or whether it arises when the proceedings are closed; and she, having prevailed, applies to the court to have her costs—that is, her whole expenses in relation to the pro-

¹ *Dickens v. Dickens*, 2 Swab. & T. 103, 105.

² *Wells v. Wells*, 1 Swab. & T. 308, 312.

ceedings—taxed against her husband. But there is this practical limitation; namely, that, if the wife omits to make any application to the court until after the suit is ended; or, if she makes application before, but receives less money than she needs, and if she has failed in the suit, she is then too late to make any, or any further, demand. “The foundation of the rule of the Ecclesiastical Court,” it was observed, “was, that the wife should be enabled to bring her case to a hearing, and defend herself, and so up to any time previous to the hearing the husband was generally liable to have the wife’s costs taxed against him, and the court has so far followed the rule; but, if the wife has brought her case to a hearing, howsoever, and fails, the husband has never then been made liable to her costs.”¹

§ 417. To meet, however, every exigency, it has of late become the practice of the English Matrimonial Court to order a sum of money to be paid into the registry by the husband, out of which the wife’s taxed costs shall be im-bursed. This practice was adopted to relieve the husband from the necessity of having them actually paid before the hearing, “when it is so difficult to form a correct judgment of what the actual costs will be.”² But if by any oversight the husband has not been ordered to pay money enough into the registry, and the hearing takes place, and the wife fails in her suit, the deficiency cannot then be made up,—the same principle applying here, which was mentioned in our last section.³

§ 418. The reader is aware, that the course of things is such in our American courts as not to admit of the exact practice, in respect of costs, whereby the ends of justice are in these cases subserved in the English Matrimonial Court. But while the details of the procedure may differ, the same

¹ *Keats v. Keats*, 1 Swab. & T. 334, 358. And see ante, § 388.

² *Hepworth v. Hepworth*, 2 Swab. & T. 414, 416.

³ *Sopwith v. Sopwith*, 2 Swab. & T. 105; *Glennie v. Glennie*, 3 Swab. & T. 109.

end may be, and in most of our States is, attained here as there. In the English House of Lords, where judicial proceedings used to be in effect carried on for divorce *a vinculo*, though in the form of an application for a parliamentary bill, the husband was required to furnish the wife with money to procure professional assistance.¹ And in one case before the Matrimonial Court, the Judge Ordinary, alluding to this practice, observed: "That, I think, though not precisely in the same form, affords me a sufficient principle on which to act; and I shall" — adopting the principle, and shaping the procedure to accord with the usual course before the particular judicial tribunal — "make the order for the taxation of the wife's costs up to the present time."² In like manner, our American tribunals mould the common law or the statutory right, whichever it may be, to suit their own forms, yet preserve the right as unimpaired in its substance as possible.

§ 419. This so extended statement of the English practice seemed to the writer to be made necessary by the fact, that there was no other so available a way open to him, whereby he could convey to the reader an exact idea of the principle upon which this doctrine of the wife's costs, as it is called in England, or the doctrine of her being alimented in respect of the expenses of the suit, proceeds. In the United States, the statutes differ, and the practice of the courts differs; yet the pretty uniform object is to attain the same end which is described in the foregoing sections. In Massachusetts, under the statute, it was laid down, that the amount which the court will require a husband to pay for his wife's expenses in the cause, is not to exceed what may be deemed, under all the circumstances of the case, a reasonable amount for the compensation of counsel and the payment of the other charges, without regard to what might properly be demanded, as between counsel and client, by the counsel ac-

¹ *Sopwith v. Sopwith*, 2 Swab. & T. 105, 106; *Llewelyn's Divorce Bill*, 1 Macq. Scotch Ap. Cas. 280.

² *Weber v. Weber*, 1 Swab. & T. 219, 221.

tually employed. "The view of the court is," it was said, "that they cannot enter into the question as between counsel and client, as to what charges may properly be made by the counsel actually employed;"¹ for the reader perceives, that, if the court did, this would enable a wife, irrespective of the demands of her particular case, to retain the most eminent counsel at the bar on her side, — a luxury, which, in the majority of cases, husbands do in fact deny to themselves.

§ 420. The Massachusetts doctrine, mentioned in the last section, suggests another; namely, that, although the husband is properly to pay the whole expenses of the wife about the suit; and although, as matter of poetic theory, there is alike one law for the rich and for the poor, wherefore the poor person ought to have as good a lawyer, and to expend as much in incidental things, when he brings or defends a suit, as does the rich man; yet since, in real fact, poor people do not spend so much money in their lawsuits as rich ones, a poor husband should not, in these cases, be required to provide so much money for his wife as should a rich one. The principle here is analogous to that on which temporary alimony proceeds, yet it is not exactly the same. And there are no cases which will much help us in elucidating the principle. In Georgia, where the issues presented involved the question of the wife's chastity, and she was of previous good character, and the husband was worth twelve thousand dollars, it was deemed that five hundred dollars was not an excessive sum for him to be required to pay for her counsel fees. "As nothing," said Stephens, J., "can be dearer to a lady than her character for chastity, so nothing could justify greater expense in its defence."²

§ 421. But it is deemed not best to conduct this discussion further. The reader who desires to consult more cases

¹ *Baldwin v. Baldwin*, 6 Gray, 341. As to the matter under our earlier statute, see *Coffin v. Dunham*, 8 Cush. 404.

² *Collins v. Collins*, 29 Ga. 517.

on this subject than have been already referred to, will do well to look into those which are here mentioned in a note. Some of them will assist him only by way of illustration; yet each has in it something, which, in some circumstances, may be useful.¹

§ 422 [586]. A statute in Kentucky directs the courts to provide for the support of the wife during the pendency of the suit, unless she is living in adultery. This duty is imperative; and, when an application is made for alimony *pendente lite*, and it is not claimed she is living in adultery, the only further matter open for inquiry relates to the amount of the husband's estate, and whether or not the wife is already suitably provided for by him.²

§ 423 [587]. In the practice of the Ecclesiastical Courts, the question of the wife's right to alimony *pendente lite*, when her pleadings were defective, could not arise; for the question of the sufficiency of the pleadings, in those courts, is determined on their admission.³ But if this were not so, quite probably we should have the English rule, the same as the rule elsewhere,⁴ that alimony could not be given *pendente lite* to a wife whose record case would not entitle her to a final decree,—a rule, however, which should nowhere apply except when the defect is a palpable one, and the question of law is free from doubt. The English rule therefore is, that, when a suit is instituted by or against the wife; and

¹ Tucker v. Carlin, 14 La. An. 734; Bell v. Jones, 10 Md. 322; Hart v. Hart, 11 Ind. 384; Pinckard v. Pinckard, 23 Ga. 286; Morrill v. Morrill, 2 Barb. 480; North v. North, 1 Barb. Ch. 241; Goldsmith v. Goldsmith, 6 Mich. 285; Forrest v. Forrest, 5 Bosw. 672; Pearson v. Darrington, 32 Ala. 227; Farwell v. Farwell 31 Maine, 591; Simmons v. Simmons, 1 Robertson, 566; Greg v. Greg, 2 Add. Ec. 276, 285; Dwelly v. Dwelly, 46 Maine, 377; Ex parte King, 27 Ala. 387; Ex parte Smith, 34 Ala. 455; McEwen v. McEwen, 2 Stockton, 286; Ex parte Perkins, 18 Cal. 60; Helden v. Helden, 9 Wis. 557, 11 Wis. 554; Kline v. Kline, 1 Philad. 383, bottom paging; Thompson v. Warren, 8 B. Monr. 488; Meyer v. Meyer, 3 Met. Ky. 298, 303.

² Whitell v. Whitell, 8 B. Monr. 50.

³ Ante, § 220.

⁴ Ante, § 406.

the plaintiff's allegation is admitted, and the husband has acknowledged, or she has proved, a fact of marriage; she is at once, on establishing his faculties,¹ entitled to a decree for her *ad interim* alimony and costs; no other condition being imposed upon her.² This simple rule, whether on the whole it should be preferred to the New York rule or not, seems admirably just, and seems to cover the entire ground of reason on which the allowance of alimony and costs *ad litem* is based. For while there is no very clear objection to requiring of the wife an oath³ as a pledge of her sincerity, even this, in circumstances and suits where she could not be compelled, for other purposes, to make disclosures under oath, would place her on a footing inferior to her husband, where the true policy of the law, and the dictates of justice, demand that the parties should stand on equal ground. But especially there seems to be no satisfactory reason, why, when she is sued for a divorce, she should be compelled to lay her whole case before counsel, and answer her husband's bill, before she has an allowance of alimony and means of defence—proceedings attended with delay and expense, sometimes embracing a large share of the time and cost of the suit. Neither does there appear to be any sufficient cause for requiring her to produce affidavits of witnesses; which, as they cannot be read on the hearing, involve a waste of labor and expense, but disclose to her husband how she intends to establish her case, while he cannot be compelled to make to her the like disclosure in turn.

§ 424 [588]. Alimony *pendente lite* is usually made, by the terms of the order itself, to commence from the return of the citation.⁴ This is the true rule; “for, till then, the wife may be considered as able to obtain subsistence on the credit

¹ *Butler v. Butler*, 1 Lee, 38, 5 Eng. Ec. 299.

² Coote Ec. Pract. 338; ante, § 384–386; *Poynter Mar. & Div.* 247; *Oughton*, tit. 206.

³ Ante, § 408.

⁴ *Hamerton v. Hamerton*, 1 Hag. Ec. 23, 3 Eng. Ec. 17; *Bain v. Bain*, 2 Add. Ec. 253, 2 Eng. Ec. 293.

of her husband."¹ But it may be made to commence earlier or later; earlier, as from the date of the citation, where the husband is promoter, and he does not use due diligence in its return;² later, as where the wife had an income of 300*l.* per year of her own, and it was two years before she applied for the alimony. In this case the court of appeal directed it to commence from the date of the decree below.³

§ 425 [589]. We have seen, that, till alimony is decreed, the husband is liable for the debts of the wife, as though the suit were not pending.⁴ Therefore all sums which he has paid on her account, or to her, subsequently to the time when this allowance is to commence under the order of the court, are to be deducted as part payment of the alimony.⁵ For these reasons it has always been considered desirable, that the question of alimony *pendente lite* be settled at an early stage of the suit.⁶ Yet the wife does not absolutely lose her right by any delay in making her application; and the allowance may be made, both of temporary alimony and expenses of the suit, even as late as the final entry of the decree for divorce, or at the same time with the decree for permanent alimony,⁷ — a proposition, however, which may be found to be somewhat qualified in some courts by doctrines stated in previous sections.⁸ Or the decree for permanent alimony may — so it is held in New York — make this allowance to commence from the filing of the bill, when such a course is just and reasonable;⁹ though the true rule in ordinary cases is, that permanent alimony shall commence from

¹ Loveden v. Loveden, 1 Phillim. 208.

² Loveden v. Loveden, *supra*.

³ Rees v. Rees, 3 Phillim. 387, 1 Eng. Ec. 418.

⁴ Ante, § 401.

⁵ Hamerton v. Hamerton, 1 Hag. Ec. 23, 3 Eng. Ec. 17; Harris v. Harris, 1 Hag. Ec. 351, 3 Eng. Ec. 153. And see Coles v. Coles, 2 Md. Ch. 341.

⁶ Brisco v. Brisco, 2 Hag. Con. 199.

⁷ Frankfort v. Frankfort, 3 Curt. Ec. 715; Melizet v. Melizet, 1 Parsons, 78.

⁸ Ante, § 388, 416, 417.

⁹ Forrest v. Forrest, 25 N. Y. 501; Burr v. Burr, 7 Hill, N. Y. 207. In this case, temporary alimony had been ordered and paid; and the court directed, that the amount so paid be deducted from the permanent alimony. But see Ricketts v. Ricketts, 4 Gill, 105. And see post, § 461.

the date of the sentence.¹ In an Upper Canada case, where the wife, who was complainant, had neglected to apply for temporary alimony, the court still refused to order the permanent alimony to commence at a period earlier than the date of the decree. "The cases," said the Vice-Chancellor, "show, I think, conclusively, that in England permanent alimony is not grantable till sentence or decree."² Yet if we look into the reason of the matter we must conclude, that, under special circumstances, not always as of course, the permanent alimony should be made to commence with the bringing of the suit, though, from the sum thus found to be due, the temporary alimony, if any were paid, should be deducted, and there might also be other equitable deductions required.

§ 426 [590]. Where, in the English ecclesiastical practice, there was an appeal, the permanent alimony, ordered by the Superior Court, was usually made to commence from the date of the sentence in the court below; because the appeal suspended the sentence, and, if it did not so commence, there might be an interval during which the wife would have no maintenance. But when she was guilty of laches in prosecuting her appeal, the rule was for the alimony to commence from the return of the inhibition.³

¹ *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231.

² *Soules v. Soules*, 3 Grant, U. C. Ch. 113, 115.

³ *Loveden v. Loveden*, 1 Phillim. 208.

CHAPTER XXIV.

EXPOSITIONS CONCERNING BOTH KINDS OF ALIMONY.

§ 427 [591]. Alimony is not a sum of money, or a specific proportion of the husband's estate, given absolutely to the wife; but it is a continuous allotment of sums payable at regular periods, for her support from year to year.¹ It must secure to her, as wife, a maintenance separate from her husband: an absolute title in specific property, or a sale of a part of the husband's estate for her use, cannot be decreed or confirmed to her as alimony.² Even where a statute authorized the court to allow the wife, on a divorce from bed and board, "such alimony as her husband's circumstances will admit, not exceeding one-third of the annual income or profits of his estate or occupation; or to assign to her separate use such part of the real and personal estate of the husband as the court shall think fit, not exceeding one third-part thereof, as the justice of the case may require; which shall continue until a reconciliation shall take place between the parties;" it was held, that an assignment of specific property to the wife, under the latter clause, does not vest the ownership in her, so as to enable her to convey a good title to it by sale. It gives her only the use of it until reconciliation, or the death of one of the parties. And where a wife had sold property so assigned to her, the husband, on her death, was held entitled to recover it back.³

¹ *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126; *Wilson v. Wilson*, 3 Hag. Ec. 329, note, 5 Eng. Ec. 129.

² *Maguire v. Maguire*, 7 Dana, 181; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Almond v. Almond*, 4 Rand. 662; *Lockridge v. Lockridge*, 3 Dana, 28; *Russell v. Russell*, 4 Greene, Iowa, 26.

³ *Rogers v. Vines*, 6 Ire. 293.

§ 428 [592]. So alimony cannot be allowed for the term of the wife's life;¹ because it is a maintenance to her,² while the husband's duty to maintain her ceases at his death. Therefore the expression in the decree of alimony should be, that it continue during the joint lives of the parties, or until reconciliation and recohobitation. But for the security of the wife against the designs of a husband who might, for the purpose of frustrating the decree, entice her into a momentary reunion, and then expel her or renew his wrongful conduct; it has been considered better the decree should state generally, that it is to continue during their joint lives, and that the court reserves the right to change the allowance from time to time, according to circumstances. It has been deemed proper also, to require of the husband a bond, with approved security, that the alimony shall be paid according to the decree, in instalments; reserving the power to compel payment from time to time by attachment, sequestration, or otherwise.³ The form of the decree, however, is probably not the same in all courts;⁴ but it is unnecessary to discuss this matter further here.

§ 429 [593]. Still, on general principles, aside, it seems, from considerations of the form of the decree, the court may at any time, and from time to time, on any change in the circumstances of the parties, increase or reduce the sum allotted for alimony, temporary⁵ or permanent.⁶ And Dr. Lushington has observed: "Where there is a material alteration of

¹ Lockridge v. Lockridge, 3 Dana, 28.

² Ante, § 351.

³ Lockridge v. Lockridge, 3 Dana, 28; Logan v. Logan, 2 B. Monr. 142; Mayhugh v. Mayhugh, 7 B. Monr. 424; Paff v. Paff, Hopkins, 584.

⁴ See ante, § 228; Burr v. Burr, 7 Hill, N. Y. 207.

⁵ Cox v. Cox, 3 Add. Ec. 276, 2 Eng. Ec. 531; Amos v. Amos, 3 Green Ch. 171; McGee v. McGee, 10 Ga. 477, 491.

⁶ Otway v. Otway, 2 Phillim. 109; Rogers v. Vines, 6 Ire. 293; Richmond v. Richmond, 1 Green Ch. 90; Bursler v. Bursler, 5 Pick. 427; Holmes v. Holmes, 4 Barb. 295; Barber v. Barber, 1 Chand. 280; Sheafe v. Sheafe, 36 N. H. 155; Saunders v. Saunders, 1 Swab. & T. 72; Foote v. Foote, 22 Ill. 425. So also under the Arkansas statute, Bauman v. Bauman, 18 Ark. 320. As to Illinois, see Wheeler v. Wheeler, 18 Ill. 39.

circumstances,¹ a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased; and, if the husband is *lapsus facultatibus*, the wife's allowance ought to be reduced. Applications of this sort are of rare occurrence. I only remember two instances where applications of either kind have been successful, the case of Foulkes and Foulkes, for an increase;² and Cox and Cox,³ for a reduction."⁴

§ 430 [593]. Applications to change the amount of alimony once fairly settled, ought evidently to be carefully scrutinized; but, if both parties act in good faith in the exercise of their best judgments, both parties must live. When the husband, asking a reduction, alleges an alteration in his circumstances, the court will consider, whether it has been brought about by any improper conduct, and especially by any attempt to defraud the wife of her alimony.⁵ And it was once held, under the particular facts of the case, that the reduction of the husband's income by unprofitable speculations was no ground for a proportionate reduction of permanent alimony, allotted twenty years before.⁶ The result of this case, however, should plainly not be elevated into a general rule; for, in some circumstances, failure in speculations should in justice be taken into the account, on the one hand, while success in speculation would surely be taken into the account on the other hand.⁷

§ 431 [593]. It has been held in New York, that the wife cannot have her alimony increased by reason of her increased expenses growing out of rendering support to a person whom

¹ See *Westmeath v. Westmeath*, 3 Knapp, 42; *Pemberton v. Pemberton*, 2 Notes Cas. 17.

² *Foulkes v. Foulkes*, Poynter Mar. & Div. 256, note.

³ *Cox v. Cox*, *supra*.

⁴ *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 129.

⁵ *Lockridge v. Lockridge*, 2 B. Monr. 528, 3 Dana, 28. And see *Rees v. Rees*, 3 Phillim. 387, 1 Eng. Ec. 418; *Kirkwall v. Kirkwall*, Poynter Mar. & Div. 255, note.

⁶ *Neil v. Neil*, 4 Hag. Ec. 378.

⁷ See post, § 449-451.

the husband is under no legal obligation to maintain.¹ Likewise in an English case the court held, that a husband cannot have the alimony reduced by reason of his having to pay debts contracted by the wife, anterior to the allotment of temporary alimony. "It is not alleged," said Dr. Lushington, "that during that period the husband furnished the wife with any means of subsistence whatever; and it is now established by the decree of this court, that, by reason of his cruelty, the wife was justified in separating herself from him. Under such circumstances, I will not enter into a consideration, whether the expenses were extravagant or not; the whole fault is at the door of the husband; he compelled her to leave his home, and left her without the means of subsistence, and, so situated, it might be difficult for her to get credit, and live economically. But be this as it may, the application is altogether too late; and such a deduction from permanent alimony would be without precedent."² The application to vary the amount of alimony is to be made by summary motion, or petition in the original cause, not by a new proceeding.³

§ 432. In one of the early Tennessee cases it was held, that a husband who has been divorced from bed and board, and decreed to pay alimony to his wife, cannot avoid the payment of it, on account of her subsequent lewdness and adultery. But this result was based on the direct words of the statute. "It is believed," said Whyte, J., "that this question depends solely on our act of assembly concerning divorces. Sec. 9 says, that, for certain causes therein specified, and due proof thereof made, it shall be lawful for the court to grant the wife a divorce from 'bed and board, and also to allow her such alimony as her husband's circumstances shall admit of, &c., which shall continue until a reconciliation takes place, or the husband by his petition offers to cohabit with her again, and use her as a good husband ought to do.'"

¹ Halsted v. Halsted, 5 Duer, 659.

² Harmar v. Harmar, Deane & Swabey, 282, 284.

³ Bauman v. Bauman, 18 Ark. 320, 333.

And it was further added, that matter of adultery, supposing the charge to be true, "is otherwise provided for by the act, and a higher remedy given him than that sought by his plea; to wit, a divorce from the bond of matrimony."¹

§ 433. Some questions relating to the increase or the reduction of the alimony, where the divorce is from the bond of the marriage, depending upon considerations applicable only to this kind of divorce, will be considered in a chapter further on.² It may be observed here, that it is difficult, perhaps impossible, to lay down such rules, relating to the increase or the reduction of the alimony, as shall be of easy application to all cases, and shall be found just in all. Plainly, the question, when it comes up on such an application, is not the same question, to be decided over again, which was involved in the original decree. The decree settled something; but a new question arises every day afterward; and it is this new question, not the old one, on which the court passes when asked to increase or reduce the alimony. There is in our law no principle which would permit the judge, in the absence of fraud or any thing of the kind, to overhaul the original sentence, when asked to pass a new one in these cases. The original sentence, therefore, is to be taken to have been just at the time it was pronounced, yet it is not to stand as a bar to the new case. If, indeed, the original decree of alimony was meant to be a mere nominal one,³ leaving the question to be fully adjudged afterward, then it should not have the same force which in ordinary circumstances would be accorded to it. And in an Upper Canada case, the court, having increased the wife's alimony from £25 to £200 a year, in consequence of the husband's increased faculties, added: "Should any application be made to this court to reduce the allowance to the wife, in consequence of the altered

¹ *Sloan v. Cox*, 4 Hayw. 75, 76, 77. See *Begbie v. Begbie*, 3 Halst. Ch. 98; *Griffin v. Griffin*, 23 How. N. Y. Pr. 189, 21 Ib. 364.

² *Post*, 477 *a et seq.*

³ See *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Lawson v. Shotwell*, 27 Missis. 630; *Chapman v. Chapman*, 13 Ind. 396; *Bankston v. Bankston*, 27 Missis. 692.

circumstances of the case, it will consider itself at liberty to consider the question anew, and to readjust the allowance proper to be made in the new state of affairs.¹ Here would seem to be a special reservation of power, not within the general rule. These are some of the obvious, outside views of the matter; yet they leave much to be considered on each several application.

§ 434 [594]. If the alimony has been suffered to run in arrear, at least with the tacit consent of the wife, any disbursements the husband has consequently been compelled to make on her account² will be deducted from the sum due, on her application to enforce the payment.³ And as alimony is for the maintenance of the wife from year to year,⁴ the court will not, without sufficient cause shown for the delay, compel the payment beyond one year prior to the monition.⁵ This last proposition, again, can in reason apply only in particular circumstances, not in all.

§ 435 [595]. The wife, suing for divorce, even for divorce from the bond of matrimony, cannot make, previous to the decree of divorce, a valid agreement concerning alimony. For while the matrimonial relation continues, she is not legally competent to enter into any contract; and the court will not, without examination, sanction any stipulation of hers on this subject; because "it would have a tendency to produce collusion between the parties, with a view to the dissolution of the marriage." An agreement of this nature might indeed under some circumstances be sanctioned, when affirmatively shown to be fair and proper.⁶ As the divorce

¹ *Severn v. Severn*, 7 Grant, U. C. Ch. 109.

² *Ante*, § 401.

³ *Ante*, § 427.

⁴ *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 128.

⁵ *De Blaquiére v. De Blaquiére*, *supra*, and *Wilson v. Wilson*, cited in a note to the same case, 5 Eng. Ec. 129. And see *Grosso v. Grosso*, cited 1 Phillim. 210.

⁶ *Daggett v. Daggett*, 5 Paige, 509. And see *Rogers v. Rogers*, 4 Paige, 516; *Kirby v. Kirby*, 1 Paige, 565; *ante*, § 235-237. And see, for some principles applicable in the case, *People v. Mercein*, 8 Paige, 47, 68; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Converse v. Converse*, 9 Rich. Eq. 535.

from bed and board does not dissolve the marriage, there may be doubt precisely how far the wife, after obtaining such a divorce, can make a valid relinquishment of her claim to the alimony allotted her under the decree. Where a wife, in a letter to the solicitor of the husband, expressly abandoned the alimony, but she was shown to have done this for the purpose of influencing the husband to let her son be with her, the court said: "I doubt, whether, in law, it was competent for her, in that form, to relinquish the benefit of the decree of the court. This is a contract between husband and wife; and, though the principles applicable to such contracts are not strictly the same after a legal separation as they may be regarded while the parties are living together, yet they are not widely different. In the one case, here is the influence arising from affection; afterwards an influence of a different sort, arising from an anxiety to communicate with her children. If it were necessary to settle this point, I should be of opinion, that the whole alimony decreed to her in 1830 must be placed at her disposal, and then she will be at liberty to appropriate it as she pleases."¹ Where the divorce is from the bond of matrimony, the wife, being thereby freed from the coverture, is competent to enter into a contract respecting the alimony which was decreed to her.²

§ 436 [596]. When the wife dies, leaving arrears of alimony due to her, the rule of the Ecclesiastical Courts is, it seems, that, in those courts, her representatives cannot recover it; while also the doctrine is settled, that such arrears cannot be recovered either in the common law or in the equity tribunals, unless for the benefit of her creditors.³ Thus, where the executors of the wife brought their bill in equity for arrears of alimony, a demurrer to the bill was sustained, Lord Lyndhurst, C., observing: "It was said, that, in analogy to the cases in which this court grants the writ of *ne exeat*

¹ *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 128, by Dr Lushington.

² *Blake v. Blake*, 7 Iowa, 46.

³ *Post*, § 437 et seq.

regno, and on principle, the bill might be sustained; but it is impossible to look into those cases without seeing how very reluctantly the court has acted in giving relief.¹ Then it was said, that the party will be without remedy, because executors cannot maintain a suit in the Ecclesiastical Court. That argument operates, I think, the other way; for executors may maintain suits in the Ecclesiastical Court, but not for arrears of alimony. It should seem, therefore, that the claim must cease with the death of the wife. That is probably the principle; but it does not follow that, therefore, this court has jurisdiction. There is no instance of such a bill as the present being filed against the husband, by the executors of the wife; and I should be very averse to establish a precedent. The authorities do not warrant it. The cases in which the court have granted the writ of *ne exeat regno* do not warrant it; nor, from the circumstance of the Ecclesiastical Court not interfering, can I found any jurisdiction in this court.”²

§ 437 [597]. So, in Pennsylvania,³ a wife brought her suit at the common law for the recovery of her alimony, pending which suit she died; and her administrator came in to prosecute it. The court held, that he was not entitled to recover, except for the use of her creditors, with whom she had contracted debts in consequence of his withholding payment in her lifetime. The opinion, by Rogers, J., is replete with learning and sound sense; and we cannot better contemplate several points relating to this subject, than as presented in his very words. He said: “A sentence of divorce *a mensâ et thoro* does not so far destroy the relation of husband and wife as to make the latter a *feme sole*; such a sentence merely suspends, for a time, some of the obligations arising out of that relation. A woman divorced *a mensâ et thoro*, and living separate and apart from her husband, cannot be sued as a

¹ See *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, 7 Ves. 173. And see 2 Story Eq. Jurisp. § 1472.

² *Stones v. Cooke*, 8 Sim. 321. note.

³ *Clark v. Clark*, 6 Watts & S. 85.

feme sole; unless in the known excepted cases of abjuration, exile, and the like, when the husband is considered as dead, and the woman as a widow. The same holds good where she is divorced *a vinculo*.¹ Alimony is not considered the separate property of the wife, but it is that proportion of the husband's estate which the courts allow her, for present subsistence and livelihood according to law, when they decree a separation from bed and board. In *Vandergucht v. De Blaquiére*,² it was attempted to assimilate alimony to [an estate settled to] the separate use of a [married] woman; but the court denied the similitude, for alimony is liable to be varied by the court according to the husband's circumstances. A married woman divorced from her husband, and entitled to alimony under the sentence of the Ecclesiastical Court, accepted a bill of exchange for articles of dress supplied to her by the drawer, and made it payable at her banker's, to whom her alimony was paid. It was held that she did not thereby charge her alimony.

§ 438 [598]. "In case of a divorce *a mensâ et thoro*, she ought to apply her alimony to her support, as her occasions may require; and, if those who know her condition, instead of requiring immediate payment, give credit to her, they cannot sue her.³ As a divorce *a mensâ et thoro* does not destroy the relation of marriage, but merely suspends some of the obligations arising out of that relation, it follows that the right, as regards succession to property, is not impaired. Thus it appears, that the title to property, whether dower, curtesy, or personal estate, is affected by divorce according to the nature of the divorce; for, if it be a dissolution of the marriage, and then only, the rights consequent upon it will cease. But where the bond of matrimony is not

¹ *Marshall v. Rutton*, 8 T. R. 545; *Hyde v. Price*, 3 Ves. 437; *Lean v. Schutz*, 2 W. Bl. 1195.

² *Vandergucht v. De Blaquiére*, 8 Sim. 315.

³ *Beard v. Webb*, 2 B. & P. 93; *Marshall v. Rutton*, 8 T. R. 545; *Murray v. Barlee*, 3 Myl. & Keen, 209, 220.

dissolved, as in case of a divorce *a mensâ et thoro*, the rights of the parties, so far as regards succession to property, remain as before. From this it would result, that the arrears of alimony belong to the husband; and it would seem to be against right to compel him to pay to another that which belongs to himself. And this may have been avoided by the husband, who might upon a proper application have the letters of administration set aside." Yet, as the husband had neither taken out administration, nor applied to have the letters to the plaintiff vacated, he could not set up his right in this collateral way. There appearing also to be debts which the deceased wife had left unpaid, the plaintiff was allowed to recover for the benefit of her creditors; the court observing: "If, after payment of the debts, anything should remain, the administrator will hold it for the use of the husband, on the principle before stated."¹ It seems however, that, if the husband, instead of the wife, dies, the estate which he leaves is liable to pay the alimony due at the time of his death.²

§ 439 [599]. In accordance with these principles, where the court had ordered the husband to pay his wife a sum of money weekly, during the pendency of her bill for divorce, but before its payment the bill was dismissed, it refused afterward to enforce the payment for her separate use. She was still his wife, and whatever she might have belonged to him; and, if he should in form pay this money to her, it would continue his, and he could take possession of it. There was no authority in the tribunal to set it apart for her separate use, except as the consequence of a divorce, or as support during the pendency of a divorce suit; but, this suit being dismissed, her duty was to return to her husband.³

¹ Clark v. Clark, 6 Watts & S. 85. And see Sterling v. Sterling, 12 Ga. 201.

² Smith v. Smith, 1 Root, 349; Sloan v. Cox, 4 Hayw. 75. See Jamison v. Jamison, 4 Md. Ch. 289, 298. As to the effect of the husband's bankruptcy, &c., see Newhouse v. Commonwealth, 5 Whart. 82; Texas's case, 1 Ashm. 175.

³ Persons v. Persons, 7 Humph. 183; s. p. Wright v. Wright, 6 Texas, 29. See Stafford v. Stafford, 9 Ind. 162.

§ 440 [599]. Where, however, a wife had proceeded against her husband for alimony, by reason of his desertion, and her attorney had obtained from him a sum of money in a compromise of the suit, the court held, that she, by her next friend, might maintain against this attorney her bill in equity for the money, and that the husband need not be made a party to the bill.¹ We may observe, that here the husband had not only himself appropriated the money for the use of his wife, but had actually parted with it. And there is doubt, whether, in any case in which the money has passed from the husband to the wife, under a decree for alimony, temporary or permanent, he can reclaim this money of her, on the ground of being her husband. There seems to be a necessity this should be so; because otherwise the decree would be substantially without legal effect. It has been adjudged, that, if on a divorce from bed and board the wife is allowed as part alimony the rents of some lands, out of which she makes an annual saving,—the husband when she dies, cannot have the fund accumulated from this saving. This decision appears to have proceeded substantially on general principles; although the court made some reference to the language of the statute, which expressly gave to the injured wife, obtaining a divorce, “capacity to acquire and dispose of such property as she might procure by her own industry, or as might accrue by descent, devise, or in any *other manner*.”²

§ 441 [600]. We should bear in mind, that the foregoing doctrines concern specifically alimony as understood in the ecclesiastical law; while they may not, in all respects, be applicable to statutory alimony, decreed to the wife on a divorce from the bond of matrimony. Whether there is scope for this distinction remains, however, to be decided. So there are, in some of the United States, allowances to the wife on a divorce *a vinculo*, under the name of alimony, differing essentially from the alimony now being considered; as in New

¹ *Spencer v. Ford*, 1 Rob. Va. 648.

² *Darden v. Joyner*, 9 Ire. 339.

Hampshire¹ and Connecticut,² where this word alimony is used to designate a portion of the husband's estate, real or personal, vested by judicial sentence in the wife, on the judicial dissolution of the marriage. So the statutory law of Ohio provides, that, when a divorce from the bond of matrimony is decreed against the husband, the wife shall be restored to all her lands and tenements, and be allowed out of his real and personal estate such share as the court may think reasonable. Under this statute it is held, that the court in its discretion may decree, either a periodical support, or a *gross* sum, "as alimony," to the wife.³

§ 442 [601]. Also in respect to divorces from bed and board, consequences may flow from the peculiar language of the statute, or of the decree. The statute in New York provides, that, upon a judicial separation, the court may make such order and decree for the suitable support and maintenance of the wife, by the husband, or out of his property, as may appear just and proper. And in a much considered case, Chancellor Walworth doubted, whether the court could award a gross sum to the wife, instead of a periodical allowance. But he held, and the Court of Errors on appeal confirmed his decision, that the decree might direct the alimony to be her separate estate, and authorize her to dispose of such part of it as shall remain at her decease, if the husband survive her, by an instrument in the nature of a will. In the Court of Errors, Nelson, C. J., observed: "The object of this direction was to take from the complainant any temptation to withhold the payment of the alimony at the time designated. Unless this power was given, any unpaid balance at her decease should of course go the husband; and, as she is aged and infirm, his past conduct may well justify the apprehension, that he would not hesitate to try the experiment of fighting off the quarterly payments, with the hope that in the mean time death might intervene and relieve him from

¹ *Parsons v. Parsons*, 9 N. H. 309; *Sheafe v. Sheafe*, 4 Fost. N. H. 564.

² *Lyon v. Lyon*, 21 Conn. 185, 197.

³ *Piatt v. Piatt*, 9 Ohio, 37.

the burden imposed by the decree. The right to give this direction in respect to the fund is not to be doubted. The same power that can vest her with the absolute separate interest in a portion of the husband's estate, can enable her to dispose of it as she may think proper. Indeed the right to make the disposition is incident to, and arises out of, the *absolute ownership* in the separate estate which the statute has authorized the court to confer on her, although it is usual to accompany the allowance with an express power. The wife has always been allowed in equity to dispose of her separate estate by an instrument in writing in the nature of a will, and a court of equity will see that her directions are carried into execution." It was also held in this case, that alimony under the statute may be made, by the decree, to continue after the death of the husband, during the entire life of the wife.¹

§ 443 [602]. Said the learned court in an Indiana case: "The present Revised Statutes authorize the courts, when a divorce is granted for the misconduct of the husband, and when the estate brought by the wife and restored to her on the divorce is not sufficient for her support, to grant such alimony out of his estate as shall be just and reasonable. There is no provision authorizing a grant of alimony in lieu of dower; but it is provided, that the court shall not have power to divest either party of their title to, or interest in, any real estate, further than is expressly provided for." Accordingly it was held, that the wife could not be divested of her dower by a decree of alimony, stated in the decree to be instead of dower.²

§ 444 [602 a]. Concerning the several points discussed in the present chapter, one or two observations are important. In the first place, alimony under the ecclesiastical law, and

¹ *Burr v. Burr*, 10 Paige, 20, in the Chancellor's and the Vice-Chancellor's Courts; 7 Hill, N. Y. 207, in the Court of Errors.

² *Russell v. Russell*, Smith, Ind. 356, 1 Ind. 510.

alimony under the statutes of our several States, may not be governed by the same principles, even where the statutes do not expressly order otherwise. Because, in most of our States, the divorce from bed and board on which the decree of alimony is rendered, places the wife more nearly in the condition of a *feme sole* than she occupies under the decree of an Ecclesiastical Court. And when the divorce is from the bond of matrimony, still more, of course, does her condition differ from that of a divorced woman alimented by ecclesiastical decree. In the next place, whatever be the form of the statute, the alimony, being granted by a court of law or of equity, partakes *possibly* of a somewhat different quality, in consequence of the fuller and wider powers of the court ordering it, and enforcing the order, from those possessed by the ecclesiastical tribunals. But these suggestions are only made as matters for consideration in a general way; it being impossible for any *a priori* reasoning to anticipate what may arise for argument hereafter.

CHAPTER XXV.

THE HUSBAND'S FACULTIES WHENCE THE ALIMONY PROCEEDS.

§ 445 [603]. BEFORE discussing the amount to be fixed by the courts for alimony, temporary or permanent, something should be said of the ability of the husband whence it is to proceed. But first let it be observed, that the amount of alimony is not to be regulated by absolute and fixed rule; it is rather matter of discretion with the court. Yet this discretion is not an arbitrary one, but a judicial discretion, to be exercised according to established principles of law, and upon an equitable view of all the circumstances of the particular case.¹ The general rule, especially in respect to permanent alimony, is, that the wife is entitled to a support corresponding to her rank and condition in life, and the fortune of her husband. "When the delinquency of the husband has been established, and the wife is the injured party, driven by his cruelty," or other wrongful conduct, "from the comfort of domestic enjoyments, she should be liberally supported."²

§ 446 [604]. We have seen, that alimony is commonly defined to be a "proportion of the husband's estate."³ But

¹ *Rees v. Rees*, 3 Phillim. 378, 1 Eng. Ec. 418; *Ricketts v. Ricketts*, 4 Gill, 105; *Burr v. Burr*, 7 Hill, N. Y. 207; *Richmond v. Richmond*, 1 Green Ch. 90; *Smith v. Smith*, 2 Phillim. 235; 1 Eng. Ec. 244; *Lawrence v. Lawrence*, 3 Paige, 267; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Hammond v. Hammond*, Clarke, 151; *McGee v. McGee*, 10 Ga. 477, 490; *Bergen v. Bergen*, 22 Ill. 187; *Pinckard v. Pinckard*, 22 Ga. 31; *Breinig v. Breinig*, 2 Casey, 161; *Foote v. Foote*, 22 Ill. 425; ante, § 406.

² *Nelson, C. J.*, in *Burr v. Burr*, supra; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203.

³ Ante, § 351 and note.

the duty of a husband to maintain his wife does not depend alone on his having visible, tangible property. While the parties are living together, they are bound to contribute by their several personal exertions to a common fund, which in law is the husband's; and from which the wife may claim support.¹ If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way; that is, under a decree for alimony, based, if he has no property, upon his earnings, or ability to earn money.² The extent to which the wife of a poor man can have from her divorced husband separate aid, must depend, as it would if he were in affluence, much upon the same circumstances which would determine her condition were they living together, in the proper discharge of their several marital duties.³ "If," says Johnston, C. J., "the parties are laboring people, the wife needs less. If she is in bad health, however, the amount should be increased. If the labor of the husband is of a comparatively unprofitable character, or if he is sickly, allowance should be made for these circumstances. If, on the other hand, he is in good health, and skilful, and is actually realizing considerable profits, the partner of his fortunes should not be refused a reasonable participation in them. Every case must be governed by its circumstances."⁴ When the income arises from the personal exertions of the husband,

¹ Vol. I. § 355, 818, 821; ante, § 369. And see *Goodheim v. Goodheim*, 2 Swab. & T. 250, 252, where the learned Judge Ordinary held, that, in awarding temporary alimony, the wife's income from her own earnings should be taken into the account. "That the wife *might* earn an income," he said, "would not be sufficient to relieve the husband; but here it is said, that she does earn."

² *Prince v. Prince*, 1 Rich. Eq. 282; *Kirby v. Kirby*, 1 Paige, 261, 262; *McCrocklin v. McCrocklin*, 2 B. Monr. 370; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Lawrence v. Lawrence*, 3 Paige, 267; *Bursler v. Bursler*, 5 Pick. 427; *Battay v. Battay*, 1 R. I. 212. But see *Tewksbury v. Tewksbury*, 1 How. Missis. 109; *Freigley v. Freigley*, 7 Md. 537; *Sheafe v. Sheafe*, 36 N. H. 155. And see *Schmidt v. Schmidt*, 26 Miss. 235.

³ *Bursler v. Bursler*, *supra*; *Smith v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244; *Brown v. Brown*, 2 Hag. Ec. 5, 4 Eng. Ec. 11.

⁴ *Prince v. Prince*, *supra*.

according to some cases, the proportion of alimony is less than when it is derived from permanent property.¹

§ 447 [605]. Obviously, then, as a general proposition, the fund out of which the wife is entitled to her alimony is the *income*² of the husband,³ from whatever source derived or derivable. The method of procedure, for ascertaining the amount of it, is, in England,⁴ and frequently in this country,⁵ for the wife to file what is termed an allegation of faculties; to which the husband answers on oath, leaving her either to rely upon his answer alone,⁶ or to produce other proofs, as she may be satisfied or not with the disclosures made by him.⁷ But the procedure is to be separately considered in another chapter.

§ 448 [606]. "The general principle regulating such allegations," observes Dr. Lushington, "is this: the wife is at liberty to plead the income of the husband, and the sources from which it is derived. With regard to his reversionary property,—and by the word *reversionary* I mean such property as the husband is entitled to for a vested interest expectant on the death of some person, or the happening of

¹ *Cooke v. Cooke*, supra; *Stone v. Stone*, 3 Curt. Ec. 341, 7 Eng. Ec. 437; *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230; *Poynter Mar. & Div.* 250; post, § 448. But see, for the explanation of this, post, § 467.

² There is a Missouri case, in which a somewhat different doctrine seems to be held; but the language therein used is exceptional to the general rule: "In the allowance of alimony, the court is not restrained to the income of the husband. There is nothing in the law which restricts the allowance of alimony to a portion of the husband's income. Such a principle, in many instances, would deprive the wife of alimony." *Scott, J., in Schmidt v. Schmidt*, 26 Misso. 235, 236.

³ Post, § 449, for the authorities.

⁴ *Coote Ec. Pract.* 339, 341.

⁵ *Lovett v. Lovett*, 11 Ala. 763; *Wright v. Wright*, 3 Texas, 168.

⁶ The husband's admissions, in his answer to the wife's allegation of faculties, are to be taken strongly against him. *Robinson v. Robinson*, 2 Lec, 593, 6 Eng. Ec. 255; and the court will presume, that he has made every possible deduction in his own favor. *Rees v. Rees*, 3 Phillim. 387, 391, 1 Eng. Ec. 418, 419.

⁷ *Brisco v. Brisco*, 2 Hag. Con, 199; *Higgs v. Higgs*, 3 Hag. Ec. 472, 5 Eng. Ec. 186; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Westmeath v. Westmeath*, 3 Knapp, 42.

some other contingency,¹—it is both usual and proper that such property should be stated. I think, that, with regard to permanent alimony, the court would make a different allotment in a case where the income of the husband was derived from his sole personal labor or exertions,² from what it would do when he had moreover a large reversionary property in expectancy.”³ But as the parents of the respective parties are under no legal obligation to maintain them; it is not proper for the wife to state, in her allegation of faculties, the amount of property possessed by the husband's father; neither is it for the husband, in answering her allegation, to mention the amount of her father's;⁴ though “a case may possibly arise in which, under very peculiar circumstances, the court would allow the property of the husband's father to be stated.”⁵ The husband, in estimating his income, is not entitled to make any deduction on account of a policy of insurance on his life, for which he pays an annual premium; since the policy is capable, at any time, of being converted into money.⁶

§ 449 [607]. In considering the income or value of the husband's estate in reference to alimony, a difficulty is liable to arise, where, in consequence of peculiarly good or ill management, it permanently yields more or less than a fair average for property generally; or where the husband's means are vested in a way to bring no direct return, as in building lots adjacent to a growing city, from which he expects to derive an ultimate profit in the increase of their marketable value. In respect to the first branch of this diffi-

¹ The case of *Bankston v. Bankston*, 27 Missis. 692, seems to contain a sort of intimation, but no decision, that property acquired by the husband after the divorce from bed and board cannot be taken into the account; but clearly, on principle, it should be, in this divorce, but perhaps not in the divorce from the bond of matrimony.

² Ante, § 446.

³ *Stone v. Stone*, 3 Curt. Ec. 341, 7 Eng. Ec. 437.

⁴ *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153; *Bruere v. Bruere*, 1 Curt. Ec. 566, 6 Eng. Ec. 391.

⁵ *Dr. Lushington*, in *Stone v. Stone*, supra.

⁶ *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153. See also *Frankfort v. Frankfort*, 4 Notes Cas. 282; *Pemberton v. Pemberton*, 2 Notes Cas. 17.

culty, it would seem, upon principle, that the wife, in entering matrimony, contracts with her husband as much in reference to his capacity for managing an estate, as to the estate itself.¹ Therefore the actual income would furnish substantially the standard. And this does appear on authority to be, as the general rule, the precise fact to be regarded.² But where, in the next branch of the difficulty, the husband chooses to take his income in the increased value of the property in which he invests his money, there would seem to be no reason why such increased value should not be considered his income, for the purpose of alimony; as otherwise he would be able to tie up his funds, and evade her claim altogether.³

§ 450 [608]. When the husband would claim any thing on the score of his bad management, especially his bad management since the *delictum* occurred on account of which the divorce is had, he must show very clearly, that, at least, he acted in good faith. And if he has encumbered his estate by his own extravagance and profligacy, the court will not allow the full deduction of such encumbrance.⁴ Especially an assignment, partly fraudulent and colorable, of all his property, made by him subsequently to the commencement of the suit, cannot in any degree impair the rights of the wife; for, "if such a contrivance could avail, no injured wife could ever hope for justice."⁵ So if the husband, after the *delictum*, particularly after the commencement of the divorce suit, grants an annuity out of his estate, "this is not a deduction he is entitled to make. The utmost the court

¹ See Vol. I. § 814, 818, 821; ante, § 446.

² *Brisco v. Brisco*, 2 Hag. Con. 199, 201; *Higgs v. Higgs*, 3 Hag. Ec. 472, 5 Eng. Ec. 186; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *Miller v. Miller*, 6 Johns. Ch. 91; *Frankfort v. Frankfort*, 4 Notes Cas. 282; *Foulkes v. Foulkes*, *Poynter Mar. & Div.* 256, note; *Stone v. Stone*, 9 Jur. 381.

³ *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153; ante, § 430.

⁴ *Mytton v. Mytton*, 3 Hag. Ec. 657, 5 Eng. Ec. 249; *Kirkwall v. Kirkwall*, *Poynter Mar. & Div.* 255, note. And see *Neil v. Neil*, 4 Hag. Ec. 273.

⁵ *Brown v. Brown*, 2 Hag. Ec. 5, 4 Eng. Ec. 11. See *Frakes v. Brown*, 2 Blackf. 295; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140.

could allow would be the interest of the debt; and even then the husband should satisfy the court, that the debt was contracted before the injury done."¹

§ 451 [609]. On an application by the husband for a reduction of alimony, Dr. Lushington observed: "The principal point is, what is to be done in respect to Hill House Farm. There is an extraordinary affidavit from General De Blaquiére's housekeeper, whose husband manages the farm while she keeps the accounts, 'that during the last fifteen years no profit has been derived from it;' but the point to be considered is, what the farm would let for. In 1820, it was estimated at £7,000; Lord Stowell put the produce of it at a low rate, and I see no reason to depart from the view he then took of it."² But the husband resided on this farm; and the mansion-house and demesne are always to be charged the same as though they were to be let;³ besides, the question arose here upon an application for the reduction of alimony, and the falling off was subsequent to both the *delictum* and divorce.⁴

¹ *Rees v. Rees*, 3 Phillim. 387, 1 Eng. Ec. 418, by Sir John Nicholl. In Tennessee the court has held, concerning a division of the property on divorce under the statute, not only that the husband cannot resist a decree giving part to the wife by reason of his having creditors who may be affected by it, but also, that, in ascertaining the amount of property to be allotted to the wife, the court will not take an account of his debts; neither, on the other hand, will it entirely disregard the interests of creditors. *Chunn v. Chunn*, Meigs, 131. This conclusion seems to have resulted from the view the court took of the principles which should govern such a division. But in respect to alimony, as understood in the ecclesiastical law, I apprehend the general doctrine to be, both in principle and in the practice of the ecclesiastical tribunals, to take into consideration the debts of the husband; certainly encumbrances on real estate are uniformly considered. If the inquiry is as to how much the husband is worth, his debts must be deducted from his visible means; if (which is the true inquiry) as to his income, still the sum he pays as interest, or to keep down his debts, must be deducted. But when, in cases of insolvency, the question is upon the settlement of the wife's own property, such as *choses in action*, upon her, the rule is very properly different. *Vaughan v. Buck*, 3 Eng. L. & Eq. 135; *Davis v. Newton*, 6 Met. 537, 544.

² *De Blaquiére v. De Blaquiére*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 129.

³ *Brisco v. Brisco*, 2 Hag. Con. 199; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178.

⁴ In *Neil v. Neil*, 4 Hag. Ec. 273, 274, on an application for the reduction of

§ 452 [610]. Where, according to an English case, the husband is doing business as partner in a firm, the wife will not be permitted to plead, in her allegation of faculties, the particulars of the partnership business; such as the number of hands employed, the amount of the annual returns, the capital embarked by the firm, the stock in trade, and the debts due; she is simply to state her husband's income, or the income of the firm with the proportion to which he is entitled. This is out of forbearance to the other partners; and because, if the husband does not fairly disclose, they may be examined as witnesses. And Sir John Nicholl observes, that "the only material circumstance is the amount of income."¹

§ 453. In cases where there is no question of fraud or of bad faith, the husband's creditors, who were *bonâ fide* such previous to the institution of the suit for divorce, may have their claims allowed, to take preference to those of the wife for alimony. So, at least, it was held in a Tennessee case;² and, on general principles, the husband's indebtedness should be taken into the account, in estimating his ability to respond to the wife's demands. This is the universal practice; and it grows out of the rule, that the *income* is the source of the alimony.

alimony, Dr. Lushington said: "How has the reduction of income on the part of the husband been occasioned? It is manifest that he was, at one time, in possession of a large capital; and, if he has thought fit to enter into large speculations, purchasing Mexican bonds, and shares nearly to the amount of 7,000*l.*, it becomes a matter of grave consideration, whether, because those investments happen for the present to be unprofitable, the wife—who is now increasing in years, and who, it must be remembered, is quite incompetent to contradict the statements of the husband as to his property—should suffer a reduction of alimony. . . . If he chooses to speculate, he must, if unsuccessful, bear the inconvenience." And see ante, § 450.

¹ *Higgs v. Higgs*, 3 Hag. Ec. 472, 5 Eng. Ec. 186. And see *Brisco v. Brisco*, 2 Hag. Con. 199.

² *McGhee v. McGhee*, 2 Sneed, 221.

CHAPTER XXVI.

THE AMOUNT TO BE DECREED AS ALIMONY.

SECT. 454. Introduction.

455-458. Considerations which blend with the Faculties.

459-461. The Amount in Temporary Alimony.

462-467. The Amount in Permanent Alimony.

468-470. Views applicable to both kinds of Alimony.

§ 454. The following matters will be embraced in the present chapter : I. Considerations which blend with the Faculties in determining the Amount ; II. The Amount in Temporary Alimony ; III. The Amount in Permanent Alimony ; IV. Views applicable to both kinds of Alimony.

I. *Considerations which blend with the Faculties in determining the Amount.*

§ 455 [611]. In determining the amount to be given the wife for alimony, the court takes primarily into its consideration the husband's faculties, as explained in our last chapter. But they are not all the things to be considered in making up the decree. Another very important thing is the income of the wife, as already mentioned,¹ arising from her separate estate, if such estate she has. And the method of computation is, to add the wife's annual income to her husband's ; consider what, under all the circumstances, should be allowed her out of the aggregate ; then, from the sum so determined,

¹ Ante, § 375, 394, 446 and note.

deduct her separate income ; and the remainder will be the annual allowance to be given her.¹

§ 456 [611 *a*]. The statement of the case, made in the last section, proceeds on the idea of an income derived from fixed property. But the income of most persons, in this country especially, is drawn from their exertions. In England, divorce suits have been generally between persons of wealth, living on the receipts which come from established fortunes ; because, in England formerly, justice as administered by the tribunals was practically only for the rich ; it was too costly to be bought by the poor. In this country, we have few fortunes resting on other foundations than the intellectual and physical capabilities of those who support them. Perhaps these considerations should not materially change with us the legal result in most cases, yet in particular instances they may have their influence, and while travelling through this subject we should carry them in our minds.

§ 457 [612]. Looking still at this question as seen in the language of the courts, we find, that, besides the joint income of the parties, the judge is to take into consideration the sources from which the husband's income is derived ; as, whether it is from his personal labor, in which case, we have already observed, the proportion will be less ;² whether the bulk of the property came from the wife, in which case, where, as under the English ecclesiastical practice, the court has no power to restore to her what she brought to her husband, the proportion will be greater ; or whether it was originally his ;³ or was accumulated by the joint exertions of

¹ *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178 ; *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195 ; and other cases cited ante, § 445.

² Ante, § 446 ; *Lawrence v. Lawrence*, 3 Paige, 267.

³ *Smith v. Smith*, 2 Phillim. 152, 235, 1 Eng. Ec. 220, 244 ; *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153 ; *Street v. Street*, 2 Add. Ec. 1, 2 Eng. Ec. 195 ; *Fishli v. Fishli*, 2 Litt. 337 ; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178 ; *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233 ; *Payne v. Payne*, 4 Humph. 500 ; *Chunn v. Chunn*, Meigs, 131 ; *Wright v. Wright*, 1 Edw. Ch. 62 ; *Foulkes*

both, subsequently to the marriage;¹ whether there are children or other relatives to be supported or educated, and on whom the burden of their support and education devolves;² the nature and extent of the husband's *delictum*;³ the demeanor and conduct of the wife toward the husband during the cohabitation;⁴ the ability of each party to earn money;⁵ the fact, if it be so, that out of tenderness the wife has long delayed instituting her suit, and has thus deprived herself of that support from her husband to which she was entitled, in consideration of which a larger proportion will be allotted;⁶

v. Foulkes, Poynter Mar. & Div. 256, note; *Devaismes v. Devaismes*, 3 Code Reporter, 124, 3 Am. Law Jour. N. S. 379.

¹ *Lovett v. Lovett*, 11 Ala. 763; *Jeans v. Jeans*, 2 Harring. Del. 142.

² *Lawrence v. Lawrence*, 3 Paige, 267; *Germond v. Germond*, 4 Paige, 643; *Blaquiere v. Blaquiere*, 3 Phillim. 258; *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230; *De Blaquiere v. De Blaquiere*, 3 Hag. Ec. 322, 5 Eng. Ec. 126, 139; *Amos v. Amos*, 3 Green Ch. 171; *Kirby v. Kirby*, 1 Paige, 261; *Fishli v. Fishli*, 2 Litt. 337; *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153; *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 220; *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233; *Butler v. Butler*, Milward, 629; *Rees v. Rees*, 2 Phillim. 387, 1 Eng. Ec. 418; *Irwin v. Dowling*, Milward, 629; *Miller v. Miller*, 6 Johns. Ch. 91; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Bedell v. Bedell*, 1 Johns. Ch. 604; *Williams v. Williams*, 4 Des. 183; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Whispell v. Whispell*, 4 Barb. 217; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Bird v. Bird*, 1 Lee, 418, 5 Eng. Ec. 396; *Lovett v. Lovett*, 11 Ala. 763; *Hammond v. Hammond*, Clarke, 151; *McGee v. McGee*, 10 Ga. 477, 490.

³ *Mytton v. Mytton*, 3 Hag. Ec. 657, 5 Eng. Ec. 249; *Burr v. Burr*, 7 Hill N. Y. 207; *Smith v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244; *Turrel v. Turrel*, 2 Johns. Ch. 391; *Rees v. Rees*, 2 Phillim. 387, 1 Eng. Ec. 418; *Williams v. Williams*, 4 Dls. 183; *Durant v. Durant*, 1 Hag. Ec. 528, 3 Eng. Ec. 231; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Hammond v. Hammond*, supra. In New Hampshire it has been even held, that, on the application for alimony after divorce granted, evidence may be introduced tending to refute the charge in the libel. *Sheafe v. Sheafe*, 4 Fost. N. H. 564. As to which point, see 1 Bishop Crim. Law, § 633; post, 515.

⁴ *Burr v. Burr*, 7 Hill, N. Y. 207; *Dejarnet v. Dejarnet*, 5 Dana, 499; *Peckford v. Peckford*, 1 Paige, 274; *Smith v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244; *Thornberry v. Thornberry*, 4 Litt. 252; *Hammond v. Hammond*, supra; *Stewartson v. Stewartson*, 15 Ill. 145; *Severn v. Severn*, 7 Grant, U. C. Ch. 109.

⁵ *Hammond v. Hammond*, supra.

⁶ *Burr v. Burr*, supra. In the Court of Errors, Nelson, C. J., in this case, observed: "I agree with the Chancellor, and the decisions of the Ecclesiastical Courts fully warrant the remark, that, if a few years of affluence can, to any extent, compensate her for the more than thirty years' unparalleled sufferings and misery which

the condition in life, place of residence, health, and employment of the husband, as demanding a larger or smaller sum for his own support;¹ the condition in life, circumstances, health, place of residence, and consequent necessary expenditures of the wife;² the age of the parties;³ and whatever other circumstances may address themselves to a sound judicial discretion.⁴ And there are cases in which the allowance to the wife will be suffered to go beyond the income, and trench upon the principal.⁵ Another consideration has also entered into the decision of this question, expressed in the words of Dr. Lushington as follows: "In decreeing alimony in 1813, I have some recollection that Lord Stowell, upon being pressed to give a larger sum, observed, that, if he could think that the wife would be able to obtain it, he would make a more ample allowance, but that the allotment of 200*l.* a year he considered would be more beneficial to her; and the difficulties she is stated to have experienced in respect to her alimony seem to bear testimony to the propriety of that decree."⁶

she has endured, either by the gratification of her feelings in the remuneration of those who have sheltered and nourished her in adversity, or in procuring her those indulgences and comforts which her age and health may require, it will not be an improper exercise of the discretion of the court—the ample means of the husband justifying it—to make the most liberal allowance."

¹ *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230; *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233.

² *Finlay v. Finlay*, Milward, 575; *Butler v. Butler*, Milward, 629; *Bursler v. Bursler*, 5 Pick. 427; *Prince v. Prince*, 1 Rich. Eq. 282; *Germond v. Germond*, 4 Paige, 643. In *Lynde v. Lynde*, 4 Sandf. Ch. 373, 2 Barb. Ch. 72, it was held, pending suit, that, if the health of the wife is such as absolutely to require her to travel and spend some time in a milder climate, the court has power to allow her a gross sum for the purpose. And the court, in this case, did allow her four hundred dollars to enable her to go and spend four months in the West Indies or the Southern States, her regular *ad interim* alimony to be suspended in the mean while.

³ *Miller v. Miller*, 6 Johns. Ch. 91; *Burr v. Burr*, 7 Hill, N. Y. 207; *Ricketts v. Ricketts*, 4 Gill, 105; *Lovett v. Lovett*, 11 Ala. 763.

⁴ And see *Russell v. Russell*, 4 Greene, Iowa, 26.

⁵ *Bursler v. Bursler*, 5 Pick. 427; *Germond v. Germond*, 4 Paige, 643. And see *Lynde v. Lynde*, 2 Barb. Ch. 72.

⁶ *Neil v. Neil*, 4 Hag. Ec. 273, 274.

§ 458 [612 *a*]. The general summary contained in the last section presents a view of the case substantially just in principle; but the point of the sources of the income requires a further examination. It has already been said in these pages,¹ that, in marriage, the parties give themselves to each other, including of course each other's property, but also including each other's persons, and physical and mental capabilities. If a wife has capacity to carry on business, and to earn a livelihood, the husband has his rights concerning this capacity; if the husband has it, the wife has her corresponding rights. And when alimony is to be decreed, whether between parties possessed of visible fortune or not, the respective capacities, as thus explained, should enter largely into the calculation. There are undoubtedly instances in which the wife's duty is to support wholly her husband by her own mental and physical exertions. And though, if he were delinquent in the duties of the marriage, on account of which she obtained a divorce from him, he would then have lost by his own fault his claim upon her, yet she would have no claim on him for alimony.

II. *The Amount in Temporary Alimony.*

§ 459 [613]. When the court awards temporary alimony, it takes into the account some considerations not presenting themselves in connection with permanent alimony. One of these is, that the husband has to maintain the expenses of the suit on both sides.² It is also to be considered, that the wife has not established her cause. If she is plaintiff, she may fail in her suit;³ if defendant, the bringing of the accu-

¹ Vol. I. § 820.

² *Brisco v. Brisco*, 2 Hag. Con. 199, 201; *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153.

³ "This suit is brought by the wife for cruelty and adultery. She now applies for alimony pending the suit; and certainly the court will not allow the same as if such a charge was established; yet I think the nature of the suit is to be considered; the charge is made; the answers are given in; — as yet there is no allegation on the part of the husband; there is no ground to consider the suit as vexatious

sation against her casts over her a shadow which should cause her to live in comparative seclusion and consequent economy until it is removed.¹ "Though," observes Sir John Nicholl, "the court cannot assume her guilty of the offence till it has been proved, still that is a sort of charge which ought to make her content to live in decent retirement. On that account, a comparatively small allotment is given during the pendency of the suit." And the peculiar nature and complexion of the case are always to be taken into the account.² Thus, where the wife sued for divorce, and the husband denied the charge under oath, this, though no answer to her claim for alimony, was still held to be proper matter to influence the court in fixing the sum.³ So, when the wife is complainant, she is generally understood to have a better claim than when she is the party accused.⁴ And temporary alimony will be less than permanent.⁵

§ 460 [614]. The ordinary rule of temporary alimony is to allow the wife about one-fifth of the joint income, deducting, of course, the income from the wife's separate estate, in the way already explained.⁶ This is regarded as a fair medium, though the proportion will vary, as we have seen,⁷ according to circumstances.⁸ When the necessities and claims of the wife have been large, one-fourth has been allotted;⁹ and Sir

— no proceedings appear to have been had for the purpose of unnecessary delay. Therefore the wife has a right to be maintained with some reference to her former comfortable state — yet with moderation." Sir John Nicholl, in *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 20.

¹ *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230.

² *Rees v. Rees*, 2 Phillim. 387, 1 Eng. Ec. 418; *Morrill v. Morrill*, 2 Barb. 490.

³ *Story v. Story*, Walk. Mich. 421.

⁴ *Amos v. Amos*, 3 Green Ch. 171; *Shelford Mar. & Div.* 590.

⁵ *Kempe v. Kempe*, 1 Hag. Ec. 533, 3 Eng. Ec. 233; *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203; *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178; *McGee v. McGee*, 10 Ga. 477, 490.

⁶ *Ante*, § 455.

⁷ *Ante*, § 445-457.

⁸ *Hawkes v. Hawkes*, 1 Hag. Ec. 526, 3 Eng. Ec. 230; *Brisco v. Brisco*, 2 Hag. Con. 199, 201; *Rees v. Rees*, 3 Phillim. 387, 1 Eng. Ec. 418; *Hayward v. Hayward*, 1 Swab. & T. 85.

⁹ *Finlay v. Finlay*, Milward, 575; *Irwin v. Dowling*, Milward, 629.

John Nicholl, in one case, where the husband had undertaken to put his property out of his hands, granted the wife 50*l.* per year out of an income of 140*l.*, and refused to direct the monition not to issue until after fifteen days; observing: "Mrs. B. is entitled to be alimanted as if living with him as his wife, and the wife of such a person could not maintain herself decently for less than fifty pounds per annum."¹ So where a large proportion of the estate came from the wife, who was proceeding against her husband, and the general complexion of the case appeared quite favorable to her, she was allowed 200*l.* in addition to her own private income of 300*l.*, making 500*l.*, while the income of the husband was 1,500*l.* — between one-third and one-fourth of the joint income.² On the other hand, in different and peculiar circumstances, the wife has been obliged to accept as small a proportion as one-eighth.³ Perhaps a less proportion will be allowed out of a very large estate than a small one; for, though no such rule exists in respect to permanent alimony,⁴ "there may be good reasons for giving less where the question is on alimony during the suit; when the wife is to live in seclusion, and wants a mere subsistence."⁵

§ 461 [615]. In New York, a wife proceeding against her husband, is, according to some judicial opinions found in the reports, allowed, as a general rule, no more than will meet her actual wants. The object of this rule is to discourage vexatious suits, and other like abuses, and to prevent indiscreet friends from fomenting family quarrels.⁶ The rule is

¹ *Brown v. Brown*, 2 Hag. Ec. 5, 4 Eng. Ec. 11. Where the income was 250*l.*, and the husband had two children to maintain and educate, the wife was allowed 75*l.* "She must have the means of furnishing herself with decent subsistence." *Harris v. Harris*, 1 Hag. Ec. 351, 3 Eng. Ec. 153.

² *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 220.

³ *Butler v. Butler*, Milward, 629. Here she was allowed 50*l.* out of an income of 400*l.*

⁴ Post, § 462 and note.

⁵ Sir John Nicholl, in *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178.

⁶ *Germond v. Germond*, 4 Paige, 643; *Lawrence v. Lawrence*, 3 Paige, 267. A similar reasoning is also adopted in *Poynter Mar. & Div.* 250. But in New York,

certainly equitable; it is adapted also to promote the ends of justice, when taken in connection with another rule, which sometimes, at least, guides the proceedings in New York; namely, to let the permanent alimony when awarded commence from the date of the suit, deducting from it the temporary allowance already paid by the husband.¹

III. *The Amount in Permanent Alimony.*

§ 462 [616]. In permanent alimony, the rule does not prevail, that a less proportion shall be given to the wife out of a large income than a small.² Indeed Sir John Nicholl suggested, though he did not consider himself authorized to carry the suggestion practically to its full length, that, when the property is large, the considerations are reversed, and the proportion should be greater. "It is the delinquent then who should have the mere subsistence, and who ought to live in retirement."³ But whether the income is large or small, the

where a husband was worth \$200,000, the court ordered him to pay the wife, who was plaintiff in the suit, one hundred dollars per month for temporary alimony, besides paying a gross sum of \$250 toward carrying on her suit. *Denton v. Denton*, 1 Johns. Ch. 364. In *Forrest v. Forrest*, 5 Bosw. 672, the wife's temporary alimony was raised from \$200 to \$250 per month. And see *Mix v. Mix*, 1 Johns. Ch. 108; *Collins v. Collins*, 2 Paige, 9; *Wright v. Wright*, 1 Edw. Ch. 62; *Worden v. Worden*, 3 Edw. Ch. 387; *Kirby v. Kirby*, 1 Paige, 261. The usual matter-of-course sum allowed, in this State, to the wife for carrying on the suit, seems to have been one hundred dollars. *Monroy v. Monroy*, 1 Edw. Ch. 382. But it may be less or more. *Longfellow v. Longfellow*, Clarke, 344; *Hammond v. Hammond*, Clarke, 151. In *Forrest v. Forrest*, supra, the wife who had been allowed \$1,500 applied for more; but she failed because she did not show that she had expended the former sum; the court said, she should show this, then more would be granted. As to the amount of the allowance elsewhere, see also *Bird v. Bird*, 1 Lee, 418, 5 Eng. Ec. 396; *Amos v. Amos*, 3 Green Ch. 171; *Paterson v. Paterson*, 1 Halst. Ch. 389; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *D'Arusmont v. D'Arusmont*, 14 Law Reporter, 311, 8 West. Law Journal, 548; *McGee v. McGee*, 10 Ga. 477, 491; *Coles v. Coles*, 2 Md. Ch. 341; *Collins v. Collins*, 29 Ga. 517; *Weber v. Weber*, 1 Swab. & T. 219.

¹ Ante, § 425 and note.

² Ante, § 460.

³ *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178. I have stated the doctrine in the text according to my understanding of this case. Shelford cites the case, however, as authority for saying, under the head of permanent alimony: "It seems,

proportion to be allotted for alimony, on the *delictum* of the husband being established, should, as we have seen,¹ be greater than pending the suit.²

§ 463 [617]. In permanent alimony, as we have seen in temporary,³ there is no established proportion of the income to be given the wife; "each case must depend upon its own particular circumstances; no two cases are exactly alike."⁴ The proportion ranges from one half, which is the highest; but not unfrequently allowed where the bulk of the property came originally from the wife, and where there is no power in the court to restore any part of it to her in specie;⁵ down through two-fifths — "no uncommon proportion"⁶ — to one third;⁷ between which outer points it appears, in England, mostly to vibrate, though it sometimes descends considerably lower.

§ 464. It would seem, from some reported cases, that in

that a larger proportion is given out of a small than a large income." Shelford Mar. & Div. 593. In Wadd. Dig. p. 58, the case has this version, — "It would appear, that the court generally gives a larger proportion where the income is small, except where the husband acquires his subsistence by his own personal exertions." I can discover in the case no such doctrine; and, — Does it exist in reason? Aside from those instances in which, from a different consideration, the amount of alimony is suffered to go beyond the income and trench upon the principal, ante, § 457, why should the proportion be less out of a large than a small estate? People are, as a general thing, as likely to live up to their income when it is large, as when it is small, and it is as proper they should; and, when the husband dies, the wife's proportion is the same. It will not do to say, that a certain sum is as much as a woman can reasonably spend; there is no limit even to reasonable expenditures; especially there is no judicial yard-stick by which expenditures can be measured off.

¹ Ante, § 459.

² Smith v. Smith, 2 Phillim. 235, 1 Eng. Ec. 244; Otway v. Otway, 2 Phillim. 109, 1 Eng. Ec. 203.

³ Ante, § 459, 460.

⁴ Smith v. Smith, 2 Phillim. 235, 1 Eng. Ec. 244.

⁵ Smith v. Smith, supra; Cooke v. Cooke, 2 Phillim. 40, 1 Eng. Ec. 178; Otway v. Otway, 2 Phillim. 109, 1 Eng. Ec. 203; Taylor v. Taylor, cited in Cooke v. Cooke, supra.

⁶ Street v. Street, 2 Add. Ec. 1, 2 Eng. Ec. 195.

⁷ Ricketts v. Ricketts, 4 Gill, 105; Pomfret v. Pomfret, cited in Cooke v. Cooke, supra.

the present English Matrimonial Court one-third of the husband's income is taken as a sort of standard, matter-of-course proportion to be allowed to the wife for permanent alimony,¹ — from which, of course, variations are to be made in particular cases, according to the principles before laid down in this chapter. And a late English writer, who appears to be familiar with the every-day practice of this court, says: "It seems now settled that one-third of the husband's income is the usual rate at which permanent alimony will be allotted, but it is liable to some variation, according to the husband's ability to pay, and the conduct of the parties."²

§ 465 [618]. "The law," says Sir John Nicholl, "has laid down no exact proportion; it sometimes gives a third; sometimes a moiety; according to circumstances."³ In *Kempe v. Kempe*, where none of the property was derived from the wife, the same learned judge decreed one-third of the income to her, observing, that he considered it a liberal allowance. "There is no reason," he said, "why the allowance should be less than usual; the husband has neither state nor family to support, — he is living in retirement on his half-pay and private fortune. His income is 729*l.*, besides personal property worth about 700*l.*, making altogether an income of rather more than 750*l.* per annum. Alimony at the rate of 250*l.* per annum will not be too much, as Mrs. Kempe is, I apprehend, willing to take the child. If she declines to take it, the court may be induced somewhat to lessen this sum; but, if the refusal proceeds from the husband, — if he will not allow his wife the comfort of retaining her infant, — the court, though it cannot control a father's rights, would not be dis-

¹ "The Judge Ordinary allotted alimony at the usual rate; namely, one third of the husband's income, saying," &c. *Hyde v. Hyde*, 29 Law J. N. S. Mat. 150, 151, note. "The Judge Ordinary refused to allot more than one third, as Mrs. Wallis had brought her husband no property; it appearing from the reported causes, that the Ecclesiastical Court only allowed a moiety when a large proportion of the joint property had come from the wife." *Wallis v. Wallis*, 29 Law J. N. S. Mat. 151, note.

² Browning Div. Pract. 89.

³ *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203.

posed to hold such refusal as a ground for reducing the allowance."¹

§ 466. Where the court has a jurisdiction to order a separate sum to be paid to the wife for the support of such minor children as are intrusted to her care, she will not be permitted to have a larger sum as alimony on the ground that she has the children to provide for; but the proper course for her is to ask for the special order, requiring the husband to pay, not an increased alimony, but money for this specific purpose.²

§ 467 [619]. If we look at the reason on which the doctrine of alimony rests, we shall see, that, properly and justly, the cases must be rare in which less than one third of the income is to be given for alimony. The law seems to recognize the right of the wife to use one third or more of the common estate, in its rules concerning dower and the distribution of the effects of a deceased husband. And on principles of natural justice and actual need, the wife, living separate from her husband, should be permitted to spend one third as much for her living as he for his. This would be making no allowance for the fact, that she is the injured party; and, if money could do any thing to bind up the wounds inflicted by the husband, his money should be ordered into this service. When we look at the cases, we do find some in which less than a third is apparently given. Thus, where the husband was a seller of venison, and his business yielded 300*l.* per annum, the wife was allowed 75*l.* only.³ Where he was a working jeweller, in the net receipt of 300*l.*, the wife's

¹ *Kempe v. Kempe*, 1 Hag. Ec. 532, 3 Eng. Ec. 233. In Lord Pomfret's case, the income was 12,000*l.* per annum, the alimony given was 4,000*l.*; the larger part of the fortune had come from the wife, and there was no family; but the husband was a peer, and had his rank and dignity to support. Cited in *Otway v. Otway*, 2 Phillim. 109, 1 Eng. Ec. 203, 204. See also *Mytton v. Mytton*, 3 Hag. Ec. 657, 5 Eng. Ec. 249; *Westmeath v. Westmeath*, 3 Knapp, 42.

² *Hyde v. Hyde*, 29 Law J., n. s., Mat. 150, 151, note; *Whieldon v. Whieldon*, 2 Swab. & T. 388; *Foote v. Foote*, 22 Ill. 425.

³ *Briggs v. Briggs*, cited in *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178.

alimony was 80%.¹ In a case of great profligacy on the part of the husband, where his income was 4,000 L , the wife was allowed 600 L in addition to her own separate income of 120 L ; but there the husband had twelve children to maintain, educate, and advance in life.² We may however observe, that, in most and probably all the cases in which the allowance has been greatly less than the usual standard, this departure from it, is, on an equitable view, only apparent, not real. For instance, where a husband has a family of children to support, his true income, as a foundation for alimony, is what remains after the proper and reasonable expense of providing for them is deducted. And where the husband, not in possession of a fortune, is obliged to rely on his personal labor and exertions, the wife should also contribute hers to the general fund;³ so that, if the husband earns, for example, a thousand dollars per year, and the wife two hundred, and the court allows her two hundred dollars alimony,⁴ she receives in reality one third, though apparently but one fifth, of the income.⁵

IV. *Views applicable alike to both kinds of Alimony.*

§ 468 [619 a]. In several places, during the discussions of this series of chapters, we have departed from the nude statement of the law as set down in the decisions of the courts, to see what is the true legal doctrine governing this matter of alimony. And as the subject seems to be not well understood in our American tribunals, neither practitioners nor judges will complain if the author here unfolds a little more fully, how the question appears to him to lie. When a breach of matrimonial duty has been committed, sufficient in extent and kind to authorize the injured one to

¹ Dawson v. Dawson, cited Ib.

² Durant v. Durant, 1 Hag. Ec. 528, 3 Eng. Ec. 231.

³ Vol. 1, § 321; ante, § 369, note.

⁴ Ante, § 455.

⁵ For further cases, see Forrest v. Forrest, 25 N. Y. 501, 516; Whieldon v. Whieldon, 2 Swab. & T. 388; Inskeep v. Inskeep, 5 Iowa, 204.

separate from the offender, — evidently, on reasons already given,¹ the offender should pay to the other as much as will place the other in a pecuniary condition equal to what would be enjoyed if the breach had not taken place. This proposition is plain, as one relating to strict right and claim. It is also plain, that, beyond this point, if the court can properly go beyond, there lies a wide range of discretion for imposing damages in compensation for an injury inflicted. But, in reason, can the court go beyond? That a wrong has been done, and therefore in reason damages are due, is certain. Certain also is it, that the law provides no action in which to recover these damages, unless the suit for divorce is this action. Now we have, first, the injury suffered, entitling to damages; secondly, a proceeding, established by law, wherein the judge has a discretion to award money, and no specific rule either of statutory or common law established to limit the discretion below a consideration of the damages. The result seems therefore to be, that, in awarding alimony, the court should take this matter of damages into its consideration. But even if this is not done directly, still the view thus presented should prompt the judges, in awarding alimony, to lean in favor of the wife, injured by the husband's conduct, in all cases where they entertain doubt.

§ 469 [619*b*]. Another matter to be properly borne in mind, while yet the courts have no power directly to act upon it, is, that, in reason, the husband, under some circumstances, when he obtains a divorce from his wife, should have alimony of her.² But these circumstances are few; because our law — that is, our common law — puts the property into the hands of the husband, to be used by him for his own support, and the support of his family. Yet legislation in some of the States is setting strongly in a direction ultimately to exhibit the spectacle of rich wives supporting poor husbands; and of husbands defrauding their creditors, while wealth embraces them in the arms of their wives. This

¹ Ante, § 371, 372.

² Ante, § 458.

condition of things is for the legislatures, not the courts; but the courts, seeing these things, may see reason also, why they should not feel compunction, when, in a proper case, they withhold all allowance of alimony to the wife.

§ 470 [619 *c*]. Finally, the award of alimony should be made with a constant reference to the husband's temptation, having wronged his wife already, to wrong her out of what the court allows. And while the judge will exact of him such security as the statute or the rules of unwritten law applicable to the case may authorize, he will also be pressed by this consideration into giving her, while his mandate is useful to her, the full sum to which the circumstances of the case point.

CHAPTER XXVII.

STATUTORY ALIMONY AND ALIMONY AWARDED ON THE DISSOLUTION OF THE MARRIAGE.

§ 471 [619*d*]. THE foregoing principles concerning alimony and its amount have been chiefly, not wholly, drawn from the fountains of the English law, as it existed in England while the divorce was only from bed and board. To what extent, or whether at all, they should be modified in this country, and especially where the divorce is from the bond of matrimony, may depend somewhat on the peculiar jurisprudence of the particular State, and the peculiar language of the statutes concerning alimony and divorce, where the question arises. In the course of the foregoing discussions, some suggestions have been made from which the views of the writer on such points may be learned.

§ 472 [620]. Probably, in the United States, the cases will be rare in which the wife will be entitled, on any general principles, to so large a proportion as one half of the husband's income for her alimony, whether the divorce is from bed and board, or from the bond of matrimony. For by the statute law of the States generally, the court is authorized to restore to her, especially if the divorce is from the bond of matrimony, the property which the husband received in consequence of the marriage; and, when this is done, an important element in the cases wherein the one-half allowance has been made, will be wanting.¹ Indeed the tendency of many of the American authorities, if any tendency can

¹ See, ante, § 464, note.

be imputed to them, seems to be to put the proportion at a point lower than the English. Even in the case of *Burr v. Burr*, where the cruelty had been very flagrant, and ten thousand dollars per annum was allowed the wife for alimony, this sum appears not to have been more than one sixth, or one fifth, or at most one third, of the probable income; though the decision did not apparently proceed altogether on the idea of giving her a precise proportion. We may notice, however, in respect to this case, that the husband had one son by a former marriage to provide for, and that the wife did not bring any considerable proportion of the property to him,—elements which, we have seen,¹ would operate to make the amount of her alimony less.² In the *Forrest* divorce case, four thousand dollars per annum were allowed out of an estate estimated at some three hundred thousand dollars.³ A wife in Maryland was allowed a third;⁴ and there are other American precedents for a third;⁵ and, in one case, Chancellor Walworth observed: “As the defendant cannot marry again during the life of the complainant, and therefore will not want property for the support of a family, if the wife had been perfectly discreet, prudent, and submissive to her husband, I should have allowed her half of this property.”⁶ In another case the same learned judge remarked: “When the amount of the estate is considerable, it is usual to allow the wife, for permanent alimony, from one fourth to one half thereof, where she is not to have the custody of the children of the marriage.”⁷ Yet, in truth, the majority of the American cases shed but little light on this subject, which has been less illumined by the rays from our American

¹ Ante, 457.

² *Burr v. Burr*, 7 Hill, N. Y. 207, 212, 10 Page, 20, 38.

³ *Forrest v. Forrest*, 25 N. Y. 501, 516.

⁴ *Ricketts v. Ricketts*, 4 Gill, 105.

⁵ *Taylor v. Taylor*, 4 Des. 167; *Peckford v. Peckford*, 1 Paige, 274; *Armstrong v. Armstrong*, 32 Missis. 279, 291; *Miller v. Miller*, 6 Johns. Ch. 91; *Williams v. Williams*, 4 Des. 183. Here one-third was allowed to the wife, and the care of the daughters committed to her; and she was to be further paid such sum for their support as should be sufficient to board and educate them.

⁶ *Pickford v. Pickford*, supra.

⁷ *Lawrence v. Lawrence*, 3 Paige, 267.

juridical science, than almost any other within their appropriate range.¹

§ 473 [620 a]. If we follow the reason on which the law of alimony rests, we shall be persuaded that the English courts have erred rather in giving too little than too much. And natural was it for them to err in this direction; because they were sitting under a system of laws, the policy of which is not to relieve the injured party, so much as, by all possible means, to keep the parties together; even when the union could bring only misery to them, and bring the institution of marriage itself into disgrace and reproach. Under this system of laws, therefore, it was natural, perhaps right, to guard closely this institution of marriage against the inroad of the idea, that, for any purpose, under any circumstances, was it desirable for an injured one to leave the cohabitation, unless cohabitation became utterly impossible. In this country, we hold indeed to the sacred character of marriage, to its being an institution of perpetual union between those who enter into it; yet we hold also, that it is not an institution in which the wrongs and sufferings of human beings are to be buried beneath the clods of a musty superstition, so deep as to exclude the voice of justice from ever entering there. The policy of our law, therefore, should be to do justice; and thus to give to the injured wife, not merely what necessity, but what justice, demands.²

§ 474 [621]. It has doubtless occurred also to the reader, that perhaps somewhat different principles should control the

¹ The following additional cases may be consulted: *Thornberry v. Thornberry*, 4 Litt. 252; *Fishli v. Fishli*, 2 Litt. 337; *Clark v. Clark*, Wright, 225; *White v. White*, Wright, 138; *Amsden v. Amsden*, Wright, 66; *Roberts v. Roberts*, Wright, 149; *Miller v. Miller*, Saxton, 386; *Richmond v. Richmond*, 1 Green Ch. 90; *Barrere v. Barrere*, 4 Johns. Ch. 187; *Bedell v. Bedell*, 1 Johns. Ch. 604; *Prather v. Prather*, 4 Des. 33; *Orrok v. Orrok*, 1 Mass. 341; *Stewartson v. Stewartson*, 15 Ill. 145; *Rees v. Rees*, 23 Ala. 785; *Rudman v. Rudman*, 5 Ind. 63; *Swearingen v. Swearingen*, 19 Ga. 265; *Wheeler v. Wheeler*, 18 Ill. 39; *King v. King*, 28 Ala. 315; *Snover v. Snover*, 2 Stock. 261.

² And see ante, § 468.

courts when allowing statutory alimony on a divorce from the bond of matrimony, from those which govern them on the divorce from bed and board. If so, then no rules could be drawn from the English jurisprudence to regulate the matter absolutely, where the divorce is from the bond of matrimony; because, in England, previous to the year 1858, no judicial divorces dissolving the bonds of a marriage originally valid, were allowed. The exact point here presented seems not to have been considered, to any great extent, by our American judges. In a Tennessee case,¹ where the court was called upon to determine the proportion of property it would set apart to the wife, under a statute which provided, that, on a divorce from the bond of matrimony, she should have decreed to her such part of the real and personal estate as the court should deem proper, consistently with the nature of the case,²—Turley, J., said: "It is to be observed, that, in England, divorces *a vinculo matrimonii* are not allowed by law, but for causes which vitiate the marriage in its inception, and render it void *ab initio*; therefore all the questions, as to what amount of alimony shall be allowed the wife, have arisen upon divorces *a mensâ et thoro*; and the practice in such cases has been, not to decree to the wife absolutely a portion of the real and personal estate of the husband, but only to allot a certain portion of his income for her support, the payment of which may be secured by being charged upon his estate. The reason for this practice seems to be, that the bonds of matrimony have not been dissolved; that the parties are not intended to be restored as near as may be to the same situation they occupied before the marriage; that the wife, not having it in her power to establish herself in life again by marriage, has no need for anything more than a comfortable maintenance; and that the law still looks to a

¹ Chunn v. Chunn, Meigs, 181.

² Stat. 1799, c. 19, which has since given place to Stat. 1835, c. 26. The latter statute, says the court, makes different provisions, and only authorizes the court to allot *alimony*, in cases of divorce *a vinculo*, as in cases of divorce *a mensâ*." Chunn v. Chuna, *supra*. Yet see Robinson v. Robinson, 7 Humph. 440, and Payne v. Payne, 4 Humph. 500, where a division of the property was made.

reconciliation between the parties, which would be rendered almost impracticable if the property were divided absolutely, each one taking his own. Yet it may be observed, that, in the case of *Smith v. Smith*,¹ the court says: 'As it is a rule of equity that no man shall take advantage of his own wrong, perhaps it would be just, that, where the husband violates the matrimonial engagement, and the fortune originally belonged to the wife, he should give back the whole of it.' There seems to be much reason in this remark; a contrary practice, however, has prevailed in England, which, as applicable to divorces *a mensâ et thoro*, we would have no disposition to unsettle.

§ 475 [622]. "But," continues the judge, "in our opinion, a very different rule of practice ought to be applied to cases of divorce *a vinculo matrimonii*. There the bonds of matrimony are dissolved; there the parties are intended to be restored, as near as may be, to the same situation they occupied before the marriage; there the wife has it in her power to establish herself again by marriage; and there the law looks to no future reconciliation between the parties. Accordingly it has always been held in England, that, in cases of divorce *a vinculo matrimonii*, the wife shall take all the property which belonged to her at the time of the marriage. But it is said, this was because the marriage was void *ab initio*, and the husband acquired no right to her property by the marriage. This is true; and, therefore, there is no necessity of a decree of a court divesting his title; but this proves nothing more than the truth of the proposition, that the husband acquired no right by the marriage. It does not prove, nor tend to prove, that it would not have been equity and justice to have divested these rights, if he had acquired any. On the contrary, no one can doubt, that, when the bonds of matrimony are dissolved, the parties ought to be placed as near as may be in the same situation they occupied

¹ *Smith v. Smith*, 2 Phillim. 235, 1 Eng. Ec. 244, and referred to in *Poynter Mar. & Div.* 252, note; s. r. in *Cooke v. Cooke*, 2 Phillim. 40, 1 Eng. Ec. 178.

before the marriage." And the court, in this case, proceeded to make a division of the estate—a topic, however, which we shall consider by itself in another chapter—according to the principles here suggested.¹

§ 476 [623]. If we accede to the propriety of the views stated by the Tennessee court, as quoted in the last two sections, the result still may be, that they are not to be applied in adjusting alimony. And perhaps the theory of alimony is to leave the parties, as to property, substantially as though no cessation of the cohabitation had taken place; and the theory of the division of the property, under the statute, to leave them substantially either as though the marriage had been originally void, or as though it had been dissolved by death. But be this as it may in regard to the division of the property, the court, in awarding alimony, on the divorce from the bond of matrimony, should consider the very different property relations which follow such a divorce, by operation of law, from those which follow the divorce from bed and board.

§ 477. Since the third edition of this work was published, matter has come to hand enabling the writer, not only to extend the discussion somewhat, but, as he believes, to cast also upon the subject a clearer light of principle, than is to be found in the earlier editions. The English Stat. 20 & 21 Vict. c. 85, § 32, provides, that, "the court may, if it shall think fit, on any such decree [of divorce from the bond of matrimony] order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable," &c. And it is held by the Divorce Court, that, under this statute, the court has a discretion to make,

¹ *Chunn v. Chunn*, Meigs, 131. To the same effect see *Chenault v. Chenault*, 5 Sneed, 248.

for a wife who obtains a divorce from her husband for his fault, a provision in the nature of alimony. But in making this provision in the nature of alimony, the late Sir C. Cresswell considered, that the rule of alimony as applied in the Ecclesiastical Courts to the divorce from bed and board, does not furnish the proper guide. He proceeds: "Very few Divorce Bills were found at the instance of the wife, and I cannot find any one in which the husband was compelled to make provision for a wife, who elected to be divorced from him. In the present case, the wife elects to have the marriage dissolved, and, although she had strong grounds for complaint, I cannot consider her as in a position at all resembling that of a wife divorced *a mensâ et thoro*. She might have been relieved from the necessity of living with her husband and have remained his wife, but her election was not to do so. Still, although she did so elect, having good grounds for complaint, the respondent may be considered as in some sort depriving her of her position, and the legislature no doubt intended that she should not seek a remedy at the expense of being left destitute. Not being able to derive any assistance from the practice of Parliament or the Ecclesiastical Court, I must take on myself the arduous duty of deciding what is reasonable in this case. I consider, then, that the wife ought not to be left destitute; on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie. The petitioner had no fortune of her own; the husband has some fortune and trading profits, but they are neither large nor certain. Under such circumstances, I think I ought not to award more than a maintenance. It is stated by counsel that the parties had agreed that the daughter should remain with her mother, and be maintained by her; I therefore take that into consideration. The next point is the period for which the payment to the petitioner shall be continued. Had she been divorced *a mensâ et thoro*, and had afterwards been herself guilty of adultery, she would have become liable to the loss of her alimony. If hereafter the petitioner should become guilty of immo-

rality, it would be unreasonable to call upon the former husband to maintain her. Again, if she avails herself of the freedom conferred by the decree of this court, and marries again, it would be unreasonable to compel the former husband to maintain her. I am therefore of opinion, that so long as the petitioner leads a chaste life, and remains sole and unmarried, and maintains the daughter, the respondent should pay her an annuity of 100*l.* per annum, payable quarterly, at the four usual feasts; the first payment the next quarter day after decree. In the event of the death or marriage of the daughter, to be reduced to 80*l.* Deed to be prepared by conveyancing counsel to secure the annuity on such fixed property as respondent has, and by his covenant. Daughter to remain in custody of the mother until further order."¹

§ 478. In New York, there is the following statute, having reference to the divorce from the bond of matrimony: "The court may make a further decree or order against the defendant, compelling him . . . to provide such suitable allowance to the complainant, for her support, as the court shall deem just, having regard to the circumstances of the parties respectively." There a divorce had been granted to a wife by reason of the adultery of her husband, and, pending a reference to determine the amount of alimony to be awarded her under this statute, the husband applied to the court for leave to show, among other things, that, since divorce granted, she, too, had committed adultery; and he contended, that this fact, if shown, would operate, in law, either to reduce the amount of alimony, or to bar the alimony altogether. But the learned tribunal refused to receive evidence of such alleged subsequent misconduct; holding, that, under the statute, the question of the allotment of alimony must be referred to the facts as they stood at the time

¹ *Fisher v. Fisher*, 2 Swab. & T. 410, 413, 414. And see *Ratcliff v. Ratcliff*, 1 Swab. & T. 467, 474; *Winstone v. Winstone*, 2 Swab. & T. 246.

the divorce was decreed, and that subsequent incontinence in the woman (it would not be literal adultery), supposing it to exist, would furnish no ground even for the reduction of alimony. "What she may do," said the learned chief justice, "after she has been divorced and the marriage relation has been dissolved by reason of his adultery, can affect no matrimonial engagement, for none exists; nor violate any matrimonial duty, for she no longer owes any to her former husband." Again: "What he should be made to pay as the means of her future support, according to all general rules of judgment, must depend upon the facts which create the right to it; and they must be the facts existing, and as they exist, when the right becomes fixed and perfect." This view the judge deemed to be aided by the peculiar phraseology of the statute. He summed up the matter as follows: "My conclusion is, that, when a woman is divorced from her husband by reason of his adultery, her right to such suitable allowance as may be just, having regard to the circumstances of the parties respectively as they exist at the time the decree is pronounced, is perfect and absolute. That it is no part of the province of the court that fixes the amount, to watch over her subsequent conduct in life, or to take proof of it, as a ground of affecting the right to an allowance, or its amount. That her subsequent misconduct no more impairs her right to it than such subsequent misconduct would impair her right to dower or to a distributive share of her husband's personal estate, if he had died intestate, and no divorce had been pronounced. That whatever may be the power of the court, under particular statutes or in the absence of any statute affecting the question, to enlarge or diminish the amount subsequently, by reason of an improvement or loss of the faculties, (the property) of either or both of them, the allowance is to be fixed in view of all the circumstances proper to be considered, as they exist at the time the decree is pronounced." The court was further of opinion, that the woman could spend the money awarded her for alimony as she chose, and the court could

not inquire into this matter on an application to make the sum less.¹

§ 479. In a Massachusetts case it was observed: "Subsequently to the marriage of Mrs. Wyman [a woman to whom alimony had been decreed on a divorce from the bond of matrimony] to another husband; this court has thought proper to reduce the amount of alimony to a nominal sum, and for the reason that it was not necessary or proper to charge her former husband for her future support By her subsequent marriage she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of the alimony."²

§ 480. The reader has seen in what terms the English and New York statutes are expressed.³ How far those terms did or should influence the decisions, and modify the general doctrines which are quoted in the foregoing sections, the reader can judge for himself. The Pennsylvania statute, under which alimony is sometimes allowed,—not to the innocent wife, there being perhaps for her other statutory provision, but to the guilty wife, against whom the husband has obtained a divorce from the bond of matrimony,—is in the following words: "that in cases of divorce under this act, if the application shall be made on the part of the husband, the court granting such divorce shall allow such support or alimony to the wife, as her husband's circumstances will admit of, and as the said court may deem just and proper."⁴ The more general provision, applicable to divorces from the bond of matrimony, contained in the Iowa statute, is the following: "When a divorce is decreed, the court may make such order in relation to the property of the parties and the

¹ *Forrest v. Forrest*, 3 Bosw. 661, 698, 694, 698, 699, opinion by Bosworth, C. J. Compare this case with *Griffin v. Griffin*, 23 How. N. Y. Pr. 189, 21 Ib. 364.

² *Albee v. Wyman*, 10 Gray, 222, 230, opinion by Dewey, J.

³ *Ante*, § 477, 478 ⁴ *Shoop's Appeal*, 10 Casey, 233. See *ante*, § 376.

maintenance of the wife as shall be right and proper." And under this provision, alimony is, among other things, decreed, though the term alimony is not found in it.¹ There are, in our States, various other statutes under which alimony, on a divorce from the bond of matrimony, is granted to the wife; and perhaps the terms in which some of them are expressed, may more directly point to the ecclesiastical rule of alimony, than do these. But whatever be the words, the court is in all circumstances required to look into the facts of each case, to consider the legal condition in which the parties will stand to each other after the divorce, and to exercise a sound judicial discretion.

§ 481. [623 b]. There are some plain propositions of common sense, governing this matter of alimony on a divorce from the bond of matrimony, as follows: First. The innocent party should not be left to suffer pecuniarily for having been compelled, by the conduct of the other, to seek the divorce. Secondly. The wife, made thus in a certain sense a widow, should not usually be set back simply where she stood, in point of property, when she entered the marriage. She has given her time, her virginity, her earlier bloom, where she has been rewarded with only ill faith in return for her faith. Thirdly. She should not stand worse than if death, instead of divorce, had dissolved the connection.

§ 482. If, therefore, upon this divorce from the bond of matrimony decreed in favor of a wife, the statute laws of the State will permit, the court, irrespective of what will be ordered as alimony, should place the wife (now indeed under coverture no longer) who, on the death of the man, will not be his widow, and who will have no future claim upon him growing in any way out of the coverture, in as good a situation as if death, instead of divorce, had broken the marriage bond, and she had survived as his widow. Beyond this

¹ Dupont v. Dupont, 10 Iowa, 112.

point there is still room for the court to travel, but up to this point the way would seem to be clear in every ordinary case. Beyond this point, then, let us look. In some circumstances, there will be unexpended property of the wife, and unconsumed articles of hers, brought by her into the common matrimonial fund, the legal title whereof has vested in the husband; and, in many cases, perhaps most, but not in all, the title, if the court has authority, should be made to revert in the woman. When all this is done, there may still be left a margin for alimony, wider or narrower according to circumstances. The woman should still have such further decree, if further be necessary, that she will not be made to suffer in her pecuniary interests for having sought the divorce; she should be left as well off, in respect to the means of livelihood, as if the husband had not broken his marriage vow. It is difficult to make this suggestion clearer by enlarging upon it, therefore let it stand as it is.

§ 483. The suggestions of the last section, it is observed, contemplate, besides alimony to be decreed under the name of alimony, an immediate investing also of actual property in the woman. Such actual property so invested would not be forfeited by any breaches of morality she might commit, or by her marrying again. And when the court, not having authority to make this investiture, or not deeming it best to exercise the authority, decrees to her alimony instead of what would be due her on this view of the case, this alimony should not be taken away, though she should commit the unlawful and disgraceful act of fornication, or the lawful and honorable one of matrimony.

§ 484. When, however, there is a decree of alimony extending beyond this point, it certainly seems to the writer, that, if the woman misbehaves herself by commerce — at least, by a habitual commerce — with other men, this further alimony should cease. On the other hand also, if she behaves herself, and does what is in the highest degree commendable, by becoming a wife to a second husband, receiving

her support from him, this further alimony may with propriety be likewise discontinued. Yet it cannot be any part of the policy of the law, which favors matrimony, so to shape its rules as to make it in effect penal for a woman, who has obtained a divorce, to marry a second time.

CHAPTER XXVIII.

THE PROCEDURE WHEREBY THE DECREE FOR ALIMONY IS OBTAINED AND ITS PAYMENT IS ENFORCED.

SECT. 485. Introduction.

486-493. Pleadings in respect to Alimony.

494-496. Evidence in Respect to Alimony.

497-500. How Decree for Alimony is made and enforced.

501-508. Obtaining Security, and the like, for its payment.

§ 485. IN the present chapter, the following matters will be discussed: I. The Pleadings in Respect to Alimony; II. The Evidence in Respect to Alimony; III. How the Decree for Alimony is made and enforced; IV. Obtaining Security, and the like, for the Payment of Alimony.

I. *The Pleadings in Respect to Alimony.*

§ 486. So far as the writer of these volumes is able to ascertain from the English books, neither the ecclesiastical libel for divorce, nor the petition made use of in the present matrimonial court, contains any mention of the husband's faculties, or ability to pay alimony, or any specific prayer for alimony. There was, indeed, in the libel, in connection with the specific prayer, the general phrase "and that otherwise right and justice may be effectually administered in the premises." Likewise accompanying the particular prayer of the present petition, we find the words "and that your petitioner may have such further and other relief in the premises as to your lordship may seem meet."

§ 487. Should, then, the American libel for divorce, when presented by the wife, contain a statement of the faculties of the husband, and a prayer for either temporary or permanent alimony? So far as the writer of these volumes has had an opportunity to know the form of the pleadings, the libel in this country generally makes some mention of the husband's ability to pay alimony, or, at least, contains a prayer for alimony, when such is really sought by the complainant. At the same time, the insertion of this matter in the libel may have been a work of mere abundant caution, not essential to the relief; and the writer believes, that, in most of our States, the law, correctly expounded, is so, and the alimony can just as well be had without any mention of it, or of the husband's faculties, as with,—though, singular as it may appear, this point seems not to have come up anywhere for adjudication.

§ 488. Alimony is an incident to a divorce suit;¹ but it is not, in separation from the suit, a thing of litigation; it may accompany the main proceedings; it may follow them in the final judgment; it cannot exist in judgment where the divorce, or the proceeding for divorce, does not; and it is difficult to see on what principle this matter must be mentioned in the principal pleadings, any more than, in a suit at the common law, the costs which the party hopes to recover must be so mentioned. And in confirmation of this view, we have, as already observed, the practice in England, whence our unwritten law is derived. It is true, that alimony is allowed only on representation made to the court, accompanied by proofs and by prayer; but the same thing, in substance, exists with regard to common-law costs.

§ 489. A party who would obtain alimony, whether temporary or permanent, must in some way make application for it to the court.² In Georgia it was said: "The rule is, that in a suit for a divorce the court will, *upon motion*, if the mar-

¹ *Lawson v. Shotwell*, 27 Missis. 680.

² *Chandler v. Chandler*, 13 Ind. 492.

riage is admitted, order the husband to pay to the wife a sum certain for her support, *pendente lite*, and for the expenses of the litigation, and he will be in contempt if he does not pay it."¹ There is a New York case which holds, that an application for alimony, pending a suit, should be by petition, with proper notice to the other party, — "this is the usual and proper mode."² The difference, however, between petition and motion in such a case may not always be very material. When alimony, either temporary or permanent, has been awarded, and a party wishes to have the amount increased or diminished, he makes his application by petition; and an original bill, or other original proceeding, for this purpose, even with respect to permanent alimony, after the principal suit has closed, is improper, or, at least, unnecessary.³

§ 490. In the present English Matrimonial Court, the application for alimony, whether temporary or permanent, is by petition, which sets forth the faculties of the husband, and prays that the alimony may be awarded.⁴ In the ecclesiastical practice, the petition was called an *allegation of faculties*.⁵ This form of petition has been sometimes used in this country; it is always proper; and, if the libel does not set out the faculties, it is necessary. And the writer is persuaded, that, on sound principles of pleading, even if the libel should mention the matter of the faculties and alimony in general terms,⁶ it should not descend to detail here, but whatever detail is necessary should be found in the petition for alimony, or, in other words, the allegation of faculties. In an Alabama case, where the question was upon permanent alimony,

¹ *McGee v. McGee*, 10 Ga. 477, 489, opinion by Nisbet, J. And see *Roseberry v. Roseberry*, 17 Ga. 139; *Swearingen v. Swearingen*, 19 Ga. 265.

² *Longfellow v. Longfellow*, Clarke, 344. And see *Mix v. Mix*, 1 Johns. Ch. 108; *Culver v. Culver*, 8 B. Monr. 128; *Lewis v. Lewis*, 8 Johns. Ch. 519; *Osgood v. Osgood*, 2 Paige, 621; *Bray v. Bray*, 2 Halst. Ch. 27.

³ *Snover v. Snover*, 2 Beasley, 261; *Paff v. Paff*, Hopkins, 584; *Neil v. Neil*, 4 Hag. Ec. 273.

⁴ *Browning Div. Pract.* 140.

⁵ *Coots Ec. Pract.* 339; ante, § 447.

⁶ *Ante*, § 487.

and the court below had, on motion and simple petition, while granting the prayer of the wife for her divorce, referred the matter to a master to inquire and report concerning the estate of the husband, and the husband had appeared before the master, it was deemed to be too late to disturb the proceedings. Yet it was observed, that the proper course would have been to file, instead of the simple petition, an allegation of faculties. "The allegation," said Ormond, J., "is made whilst the suit is in progress for alimony pending the suit, or after the decree is pronounced, for a permanent allowance." In the present case, "it would certainly have been more regular for the wife, after the decree was passed, to have filed her petition setting forth the estate of her late husband, and his answer thereto would in all probability have dispensed with the necessity of a reference."¹ And in a New York case, Chancellor Walworth observed: "If a proper allegation of faculties was filed with the master, and the answer of the husband taken to the same, as should have been done before proceeding with the reference to ascertain the proper amount of alimony," &c.; thus recognizing fully the same practice.² The practice of courts will differ in minor particulars; but there can be no doubt, that, as a correct principle of procedure, the allegation of faculties should attend every divorce cause, whether before an equity court or a court of common law, wherein either temporary or permanent alimony is demanded; still, the name of the allegation, whether it be called an allegation of faculties or a petition, is immaterial. It should set forth the faculties of the husband, and it should be answered by him. The answer in equity should be under oath; the answer in the Ecclesiastical Courts was always under oath; the same is true of the answer before the present English Divorce Court; and no reason appears why any court in our country should hesitate to require the oath. Still there are doubtless some of our States in which the oath to such an answer, or even the answer itself, has never been required in

¹ *Lovett v. Lovett*, 11 Ala. 763, 771.

² *Kendall v. Kendall*, 1 Barb. Ch. 610. See also *Wright v. Wright*, 3 Texas, 168.

practice ; and, under such circumstances, the legal adviser of the wife would hesitate to say affirmatively, that a single judge would feel justified in ordering it, though he might with more confidence apply to the bench of judges and ask to have a standing rule made to this effect.

§ 491. Where temporary alimony is asked for, and afterward permanent alimony, shall the latter be decreed upon the same allegation of faculties upon which the former was ordered, or must the work of establishing the faculties be gone over the second time? This is doubtless a matter which must depend upon the circumstances of the case and the discretion of the court. In most cases, an arrangement concerning the temporary alimony may be practically effected without the more thorough and exact examination which is or may be required to fix the permanent alimony. Particular rules of procedure, whether they rest in custom or in written rules of court, should receive such form and be so applied as to facilitate, not obstruct, the business of the tribunal ; they should be made to save labor, save expense, and at the same time promote justice.

§ 492. Allusion has been already made to the question, whether, if there is no request for alimony, and no decree of alimony, in a case, and the decree for divorce has been rendered, and the court has adjourned for the term, and the matter has been thus closed, there may be a subsequent proceeding in which the omission can be supplied, and the alimony can be granted.¹ In Massachusetts, there is the following statute: "The Supreme Judicial Court, after a decree of divorce has been granted on the libel of a married woman, may at any time, upon petition therefor, make such decree respecting alimony, or other provision for her maintenance, or for the benefit of the children of the parties, as it might have made in the original suit ; although no such decree of alimony or other provision was made in the original

¹ Ante, § 381, 382.

decree of divorce, or prayed for in such libel; and it may from time to time revise and alter such decree, as the circumstances of the parties and the benefit of the children may require."¹ The writer is informed, that, previous to the passage of this statute, though there is no reported case, the judges did not deem themselves authorized to exercise the power, as to alimony, which the statute confers. "In the former Court of Chancery, in New York, the decree used to reserve to the wife, in proper cases, the right to go before a master and get his report as to the proper allowance for alimony; and the decree, as observed by Chancellor Walworth, "might direct the payment, of the amount which should be reported by the master, upon the coming in and confirmation of his report."² And there is a New York case, in which, while the point we are now discussing is not decided, it is observed: "The suit itself was in fact terminated by the final decree; as no costs were awarded, and no right was reserved to the wife to apply for alimony for her own support." It was however held, that, in such a case, the wife, after her marriage to another husband, might in conjunction with such second husband apply to the court, by petition, for an order giving her the care and custody of a child of the first marriage, without reviving the suit; the power given to the Court of Chancery by the statute, in a suit for divorce, to direct as to the care and custody of the children, being a mere collateral power.³ Probably a correct view of this matter, as to alimony, is, that it depends upon a consideration of the statutory provisions of the State; and that, in some States, under their statutes and peculiar jurisprudence, the alimony may be awarded at any time after the main issue is closed, though no mention of alimony is to be found in the proceedings or decree, while in other States this cannot be done.⁴

¹ Gen. Stats. c. 107, § 48.

² *Coolidge v. Coolidge*, 1 Barb. Ch. 77.

³ *Cook v. Cook*, 1 Barb. Ch. 639.

⁴ And see *Lawson v. Shotwell*, 27 Missis. 630; *Winstone v. Winstone*, 2 Swab. & T. 246; *Shotwell v. Shotwell*, Sm. & M. Ch. 51; *Forrest v. Forrest*, 3 Bosw. 661; *Bankston v. Bankston*, 27 Missis. 692.

§ 493. Where there is an application to increase or reduce the alimony already awarded, the petitioner must sufficiently show the facts on which the application rests, or it will not be successful.¹ Various other matters having a greater or less relevancy to our present discussion will be found interspersed through the foregoing chapters relating to alimony.

II. *The Evidence in Respect to Alimony.*

§ 494. The most important evidence upon which, where the English practice prevails, alimony is decreed, consists in the answer of the husband, under oath, to the wife's allegation of faculties.² The wife is not bound to accept the answer, she may produce further testimony if she pleases; but in most cases she does accept of it, and it therefore settles the matter as to the faculties.³ The answer is to be construed most strongly against the husband,⁴ and he is to be presumed to have made all needful deductions in his own favor.⁵

§ 495. As we have already seen,⁶ it is or has been the custom in New York, on decreeing a divorce in favor of the wife, to refer the question of the amount of alimony to a master, who, aided by the allegation of faculties and the husband's answer thereto, and by the other facts appearing in the case, and by the testimony of witnesses whom he may summon before him, makes his report for the confirmation of the court.⁷ Still this course was never necessary even in

¹ *Saunders v. Saunders*, 1 Swab. & T. 72, 73; *Shirley v. Wardrop*, 1 Swab. & T. 317.

² *Ante*, § 490.

³ *Brisco v. Brisco*, 2 Hag. Con. 199; *Higgs v. Higgs*, 3 Hag. Ec. 472; *Durant v. Durant*, 1 Hag. Ec. 528.

⁴ *Robinson v. Robinson*, 2 Lee, 593, 594.

⁵ *Rees v. Rees*, 3 Phillim. 387, 391.

⁶ *Ante*, § 490.

⁷ And see *Mulock v. Mulock*, 1 Edw. Ch. 14. In some cases there was a reference to the master, even with respect to temporary alimony. *Gerard v. Gerard*, 2 Barb. Ch. 73. See also *Forrest v. Forrest*, 6 Duer, 102.

New York; but, if both parties requested the court to determine the question upon the facts appearing before it, this course would be pursued.¹ So, generally, where the facts were sufficiently before the court, it would proceed, without the reference to the master, to make the decree.² In New Jersey, the Chancellor observed, on making an order for alimony *pendente lite*, "I deem it unnecessary to refer the matter to a master. That course may be taken, but I have never adopted it."³ Where, in another case, the question was upon permanent alimony, the Chancellor said: "There is no need of referring this matter to a master, as I have all the evidence before me which would enable the master to determine the amount proper to be allowed."⁴ And the rule in New Jersey seems to be, where the question is of permanent alimony, to refer the matter to a master, or not, according to the circumstances.⁵ And in Upper Canada, where the hearing is also before a court of equity, it is deemed not necessary to refer the matter in all cases to the master; and the court will not make the reference, when, by passing itself upon the matter in the first instance, it can save expense to suitors. And the observation was made, that in the English Ecclesiastical Court this work is done by the court itself.⁶ Thus stands the matter before a court of equity; when the court is one of common law, there is, of course, no reference to a master.

§ 496. Before there can be temporary alimony awarded, the marriage must be either admitted or proved,⁷ and there must be some evidence of the faculties.⁸ These are matters

¹ Peckford v. Peckford, 1 Paige, 274.

² Barrere v. Barrere, 4 Johns. Ch. 187.

³ Amos v. Amos, 3 Green, Ch. 171, 172.

⁴ Snover v. Snover, 2 Stokt. 361.

⁵ Miller v. Miller, Saxton, 386; Richmond v. Richmond, 1 Green Ch. 90; Bray v. Bray, 2 Halst. Ch. 27.

⁶ Soules v. Soules, 3 Grant, U. C. Ch. 113, 121.

⁷ Mitchell v. Mitchell, 1 Spinks, 102; Roseberry v. Roseberry, 17 Ga. 139. And see Kline v. Kline, 1 Philad. 383, bottom paging.

⁸ Wright v. Wright, 3 Texas, 168.

which have already been mentioned in the foregoing pages.¹ In a North Carolina case it was held, that the affidavit of a petitioner for temporary alimony, annexed to her petition, wherein she sets forth the amount of the husband's property, and of what kind it consists, is sufficient *prima facie* for the court to act upon, in making the order for the alimony prayed.² The procedure of the Ecclesiastical Courts was such as to put the parties at once upon their oaths as to the fact of a marriage, and the same thing is at present effected in England by the rules of the Matrimonial Court. There seems to be no reason requiring the marriage, with us, to be proved in any formal way; the parties may be put to their oaths respecting it, or the proof may be the usual interlocutory proof, such as is sufficient upon ordinary motions.³

III. *How the Decree for Alimony is made and enforced.*

§ 497. The reader perceives, that the decree for permanent alimony need not be made at the same time with the decree for divorce. It would be often, and indeed generally, incorrect to try the distinct issues involved in the question of the guilt of the husband, and in the question of the amount of alimony to the wife, at one time, and before one jury, or before the court; and it is believed that no such practice is generally prevalent in this country. But upon this and some kindred matters, relative to both temporary and permanent alimony, the writer deems it not best to say more, except to refer in a note to a few cases.⁴

¹ Ante, § 386, 402-405.

² Gaylord v. Gaylord, 4 Jones Eq. 74.

³ And see Farwell v. Farwell, 31 Maine, 591; Schmidt v. Schmidt, 26 Miss. 235.

⁴ Forrest v. Forrest, 3 Bosw. 661; Reavis v. Reavis, 1 Scam. 242; Shotwell v. Shotwell, Sm. & M. Ch. 51; Goss v. Goss, 29 Ga. 109; Bankston v. Bankston 27 Miss. 692; Pinckard v. Pinckard, 23 Ga. 286; Fletcher v. Henley, 13 La. An. 150; Slocum v. Slocum, 2 Philad. 217, bottom paging; Dwelly v. Dwelly, 46 Maine, 377.

§ 498. If the order to pay to the wife temporary alimony, or money for the prosecution or defence of the suit, is disobeyed, the court may enforce it against the husband by process as for a contempt;¹ or, in some courts, there may be an execution issued, or a series of executions issued from time to time, for the alimony either temporary or permanent which has been ordered.² There are various methods by which the payment of alimony may be enforced in particular courts and under particular circumstances, but an attempt to consider all of them would lead us too far into considerations of general legal practice.³

§ 499. Some courts hold, that, for arrears of alimony, an action of debt may be maintained.⁴ By other courts, the proceeding by *scire facias* is deemed to be proper.⁵ And we have already adverted to the doctrine, as sustained by the Supreme Court of the United States, that a bill in equity will in such a case lie.⁶ But these matters depend very much upon the court, as to whether it is a court of equity or of law, in which the decree for alimony is pronounced; upon the terms of the decree; and perhaps upon some other like things. The general doctrine seems to be, that an action of debt

¹ Gerard v. Gerard, 2 Barb. Ch. 73; Ward v. Ward, 1 Swab. & T. 484; Alexander v. Alexander, 2 Swab. & T. 385; Grimm v. Grimm, 1 E. D. Smith, 190; Ormsby v. Ormsby, 1 Philad. 578, bottom paging; Ex parte Perkins, 18 Cal. 60; Dwelly v. Dwelly, 46 Maine, 377; Pinckard v. Pinckard, 23 Ga. 286; Thomas v. Thomas, 2 Swab. & T. 64; Davies v. Davies, 2 Swab. & T. 437; Hepworth v. Hepworth, 2 Swab. & T. 414; Busby v. Busby, 2 Swab. & T. 383; Purcell v. Purcell, 4 Hen. & Munf. 507; Greenhill v. Greenhill, 1 Curt. Ec. 462, 6 Eng. Ec. 376.

² Fletcher v. Henley, 13 La. An. 150; Schmidt v. Schmidt, 26 Misso. 235; Sheafe v. Sheafe, 36 N. H. 155; Sheafe v. Loughton, 26 N. H. 240; Piatt v. Piatt, 9 Ohio, 37; Olin v. Hungerford, 10 Ohio, 268; Orrok v. Orrok, 1 Mass. 341; French v. French, 4 Mass. 587; Howard v. Howard, 15 Mass. 196.

³ See Latham v. Latham, 2 Swab. & T. 299; Bird v. Bird, 1 Lee, 572, 5 Eng. Ec. 455; Cason v. Cason, 15 Ga. 405.

⁴ Clark v. Clark, 6 Watts & S. 85.

⁵ Ante, § 376, note; Hewitt v. Hewitt, 1 Bland, 101; Morton v. Morton, 4 Cush. 518.

⁶ Ante, § 203; Barber v. Barber, 21 How. U. S. 582, 590, 591. But see Barber v. Barber, 1 Chand. 280.

cannot be maintained in a common-law tribunal, for the recovery of money decreed in a court of equity.¹ In New Jersey, on a suit at common law to recover alimony and costs decreed by the equity court of New York, the plaintiff was held not entitled to recover, first, because no suit at law will lie on a decree in equity; and, secondly, because, in the nature of the decree of alimony, it cannot be enforced in this way. And on the latter point Hornblower, C. J., remarked: "Suppose a decree for alimony, and afterwards the wife should return to the husband and be reconciled; or should so badly conduct herself as to entitle the husband, in equity, to be relieved from the decree? Or, a change in his circumstances, from competency or wealth to embarrassment and poverty, under providential dispensations, that would induce the chancellor to lessen the amount of alimony? What could a court of law do in such case? We could only give judgment and execution for the whole amount."²

§ 500. When alimony is in arrears, the usual practice is to apply to the court in which the decree for alimony was rendered, for such process as the nature of the case, the terms of the decree, and the peculiar constitution of the tribunal may require.³ The application is a proceeding in the original suit, not the institution of a new one, wherefore it need not be commenced or carried on in the formal manner which the laws provide in cases of original proceedings.⁴ In circumstances wherein this summary course cannot be taken, by reason of the decree being a foreign one, or the like, the question is attended with considerable embarrassment; but it is not thought best to discuss the matter further here.

¹ *Hugh v. Higgs*, 8 Wheat. 697.

² *Van Buskirk v. Mulock*, 3 Harrison, 184, 193, 194.

³ *Hewitt v. Hewitt*, 1 Bland, 101.

⁴ *Lyon v. Lyon*, 21 Conn. 185. And see *Bauman v. Bauman*, 18 Ark. 320.

IV. *Obtaining Security, and the like, for the Payment of Alimony.*

§ 501. In some States, the decree for alimony is, or may be made, a lien on the real estate of the husband.¹ In other States, there are processes by which the property of the husband can be otherwise appropriated to the payment of the alimony.² And in some, perhaps most, of the States, the court can require the husband to give security for the payment of the alimony.³

§ 502. In South Carolina, where a husband declared his intention to abandon his wife, and to carry off the proceeds of so much of her property as he could dispose of, the court interfered by injunction, and compelled him to make a settlement of the property for the use of himself and wife.⁴ This was not a divorce case; but there are divorce cases in which the injunction has been made an efficient instrument for securing to the wife her alimony. Thus in Maryland, where a wife had brought her suit for divorce and alimony against the husband, she, pending the suit, in which he did not appear, was permitted to show, that he was entitled to certain leasehold property, which she feared he might convey away, and so render her decree for alimony practically without avail; whereupon an injunction was awarded against him, prohibiting his alienating any of the property of the existence and ownership of which she had given evidence.⁵ And in Indiana it has been laid down, that, pending a wife's bill for divorce against her husband, the court may make an order

¹ *Olin v. Hungerford*, 10 Ohio, 268; *Frakes v. Brown*, 2 Blackf. 295; *Hamlin v. Bevans*, 7 Ohio, 1st pt. 161.

² See *Guidery v. Guidery*, 2 Mart. La. 132; *Anonymous*, 1 Hayw. 347; *Spiller v. Spiller*, 1 Hayw. 482; *Feigley v. Feigley*, 7 Md. 537; *Frakes v. Brown*, 2 Blackf. 295.

³ *Prather v. Prather*, 4 Des. 33. See *Rice v. Rice*, 13 Ind. 562.

⁴ *Greenland v. Brown*, 1 Des. 196. But see *Parsons v. Parsons*, 9 N. H. 309, as to the matter under the restricted jurisdiction in equity of the New Hampshire court.

⁵ *Ricketts v. Ricketts*, 4 Gill, 105.

restraining the husband from conveying away his property during such pendency; but this will not affect purchasers *bonâ fide* obtaining, on good consideration, title of him without notice of the order.¹ In Illinois it is held, that, when a divorce is decreed in favor of the wife against her husband, the attendant decree should not direct the defendant to be perpetually enjoined from selling his property, and imprisoned till he give security for the payment of the alimony; but, instead of this, it should make the alimony a lien upon the realty, to be secured by mortgage, and a sale should be enjoined until the mortgage is completed.² This is matter pertaining to the final decree; but, on the filing of a bill for divorce in Illinois, the court will, on application, enjoin the husband against disposing of his property pending the suit.³

§ 503. In other States, the injunction is also employed whenever the court deems it to be necessary and proper. In an Alabama case it was held, that, where a wife on filing a bill for divorce alleges she has just cause to fear, and does fear, that on the filing and service of the bill her husband will remove or dispose of his whole property, but gives no reasons on which this fear is founded, an injunction should not issue; and when, in such a case, the injunction had issued on an *ex parte* application, it was on motion of the defendant dissolved. Said Goldthwaite, J.: "The allegations of the bill as to the matters which, if proved, would be a good cause for a divorce, are not of themselves a sufficient ground for an injunction to prevent the defendant from removing or disposing of his property. We do not say they might not be looked at by the court to support other allegations, which, standing alone, would not be sufficient. In the present case, however, the complainant simply alleges, that she has just cause to fear, and does fear, that on the filing of the bill the property of the defendant

¹ Frakes v. Brown, 8 Blackf. 295.

² Errissman v. Errissman, 25 Ill. 136. See, as to New Hampshire, Sheafe v. Sheafe, 36 N. H. 155; Sheafe v. Loughton, 36 N. H. 240.

³ Bergen v. Bergen, 22 Ill. 187; and see Vanzant v. Vanzant, 23 Ill. 536.

will be removed; but upon what circumstances this fear is founded, we are entirely in the dark. She should have gone further, and alleged the facts which gave rise to these fears, in order that the chancellor might see there was some ground for them; but she does not even refer them to the conduct of the defendant, which forms the gravamen of her bill."¹

§ 504. It was held by Chancellor Walworth in New York, that, though in these cases the wife is entitled to have an injunction issued, restraining the husband from parting with his property for the purpose of placing it beyond the process of the court, yet the injunction should not forbid his using the property for the necessary support of himself and his children, or working with his tools of trade, or carrying on his ordinary business. Moreover, the injunction should not be granted where the bill would be bad on demurrer.² There are various other incidental points decided in New York.³ In one case this learned lawyer observed: "The injunction, receiver, and *ne exeat* may all properly be made use of to aid the court in doing justice between the parties. The husband, who is guilty of adultery, voluntarily subjects himself and his property to the jurisdiction of this court, so far as to enable the chancellor to order his property to be applied to the support of his family during the litigation and afterwards."⁴ In some other States, there are also decisions sustaining these just views respecting the injunction.⁵ The reader has probably, however, considered, that the injunction is not a common-law process, it is a process peculiar to equity tribunals; therefore, though there is no difficulty in an equity court using this process, it might not be in the power of a common-law court to wield it, unless the

¹ *Norris v. Norris*, 27 Ala. 519, 520.

² *Rose v. Rose*, 11 Paige, 166.

³ *Laurie v. Laurie*, 9 Paige, 234; *Kirby v. Kirby*, 1 Paige, 261; *Vincent v. Parker*, 7 Paige, 65.

⁴ *Kirby v. Kirby*, *supra*, p. 262.

⁵ *Wilson v. Wilson*, 1 Des. 219; *Gilmore v. Gilmore*, 5 Jones Eq. 284; *Wilson v. Wilson*, Wright, 128; *Questel v. Questel*, Wright, 492; *Fishli v. Fishli*, 2 Litt. 337.

power were conferred by statute. The statute, to give the power, need not convey it in direct terms; for instance, if in general language a common-law court were authorized to grant divorces and to employ equity processes therein, the court could undoubtedly resort to the injunction.

§ 505. Of the equity writ of *ne exeat*, the like observation may be made as of the injunction. A court of equity may, in proper cases, employ it for the enforcement of the payment of alimony. Mr. Shelford, in his work on Marriage and Divorce,¹ states the English law on this subject as follows: "After a decree for alimony has been obtained in the Ecclesiastical Court, and the husband, in order to evade payment, is going out of the kingdom, the Court of Chancery will exercise jurisdiction by granting the writ *ne exeat regno*.² The interference of the court in granting that writ has arisen from the peculiar circumstance, that the Ecclesiastical Court cannot compel the husband to find bail;³ and, if the husband makes it appear that he does not intend to leave the kingdom, the Court of Chancery will not grant the writ, although he may not intend to pay the alimony which is due from him.⁴ This and the case of an account seem to be the only instances in which a writ *ne exeat regno* will be granted where the demand is not merely *equitable*.⁵

§ 506. "It is clearly settled that the court will grant a writ *ne exeat regno* for arrears of alimony actually due;⁶ but the court will not go further, for neither courts of law nor courts of equity are entitled to judge whether a woman is entitled to alimony or not, or what she shall ever get.⁷ The court will grant the writ *ne exeat regno* for a gross sum actually

¹ Shelf. Mar. & Div. 600, 601.

² Head v. Head, 3 Atk. 295; Vandergucht v. De Blaquiére, 8 Sim. 322; Pearne v. Lisle, Ambl. 75; Smithson's case, 2 Vent. 345.

³ Pearne v. Lisle, Ambl. 75.

⁴ 8 Sim. 322.

⁵ Anonymous, 2 Atk. 210; Howden v. Rogers, 1 Ves. & B. 129.

⁶ Read v. Read, 1 Ch. Cas. 115; 2 Ch. R. 19; Ex parte Whitmore, Dick. 143.

⁷ Haffey v. Haffey, 14 Ves. 261; see Cock v. Ravie, 6 Ves. 283.

due on a sentence obtained in the Ecclesiastical Court.¹ But before a decree is made for alimony and separation, the court will not interfere, for it cannot take for granted that there will be a decree, and shut up the husband pending the suit in anticipation of such a decree.² The writ in all these cases must be marked for the sum actually due; it cannot be for the value of the annuity given for alimony.³ But although there should have been a decree for alimony, the writ will not issue pending an appeal by the husband against the sentence allotting alimony, on the ground, that, according to the practice of the Ecclesiastical Courts, if there is an appeal, the alimony given by the decree is not understood to be due.⁴ In *Roebuck v. Roebuck*⁵ the wife obtained a sentence in a cause for adultery, establishing her innocence, alimony was decreed to her in 1785. Afterwards she appealed, not conceiving the alimony sufficient. Pending that appeal she filed a bill for a writ of *ne exeat regno*, her husband threatened to leave the kingdom to avoid paying the alimony already decreed and the increase, and the writ was marked for 600*l.*, and was granted pending the appeal for an increase of alimony.

§ 507. "A wife applied for a writ *ne exeat regno* to prevent her husband from leaving the kingdom, which he threatened, till a suit instituted by her against him in the Ecclesiastical Court for alimony, charging him with cruelty and adultery, should be determined. The Lord Chancellor asked for what sum the writ should be marked, and upon being told that it must be left to the discretion of the court, he said that the question he asked was an insurmountable objection, and thought that it could not be done under a notion of aiding the Ecclesiastical Court.⁶ An affidavit to found such a writ upon must not only say that the defend-

¹ *Shaftoe v. Shaftoe*, 7 Ves. 172.

² *Ibid.*

³ *Dawson v. Dawson*, 7 Ves. 172.

⁴ *Street v. Street*, Turn. & Russ. 322.

⁵ Cited 7 Ves. 172; Reg. lib. B. 1787, fol. 7; 1 Ves. Jun. 95, n.

⁶ *Coglar v. Coglar*, 1 Ves. Jun. 94. It does not appear what became of this case. See Beames on *Ne Exeat Regno*, 42, 2d ed.

ant is indebted in such a sum, but also mention the facts on which it arises, and on which it is grounded.¹ The rule is, that there must be an affidavit positive to the extent that the husband is going abroad, or some declaration that he is"²

§ 508. In the United States, the question of the writ of *ne exeat* does not often present itself in the same way, in divorce cases, in which it does, or used to, in England. With us, the divorce is generally granted either by the equity court itself, or by some common-law court which has substantially equity powers in the premises. When, in such a case, suppose the suit is for alimony alone, or for divorce and alimony, the wife, pending the suit, has reason to believe her husband is about to leave the State to avoid paying what she may recover, she may, notwithstanding the difficulty intimated in the above extract from Shelford, growing out of the fact of the amount to be recovered not being an ascertained sum, have her writ of *ne exeat* against her husband, according to the equity practice.³ Where the affidavit on which the writ of *ne exeat* was asked, was filed before the bill for divorce, this was held to be irregular, there being no proceeding in court upon the subject to which the affidavit related; and the Chancellor observed: "The proper course is, to file the bill or petition for divorce, and after that to file a petition for the *ne exeat*, supported by the necessary affidavit, sworn subsequently to the filing of the bill."⁴ In one case, while a proceeding was going on to enforce the payment of alimony already decreed, the wife asked for a writ of *ne exeat* against the husband, and it was granted.⁵ This case falls clearly within the English precedents.

¹ Anonymous, 2 Ves. sen. 489; 1 Br. C. C. 375.

² Oldham v. Oldham, 7 Ves. 410.

³ Denton v. Denton, 1 Johns. Ch. 364; McGee v. McGee, 8 Ga. 295; Prather v. Prather, 4 Des. 33; Devall v. Devall, 4 Des. 79; Yule v. Yule, 2 Stockt. Ch. 138; Kirby v. Kirby, 1 Paige, 261; Bayly v. Bayly, 2 Md. Ch. 326.

⁴ Bylandt v. Bylandt, 2 Halst. Ch. 28.

⁵ Lyon v. Lyon, 21 Conn. 185, 199, note.

CHAPTER XXIX.

DIVISION OF THE PROPERTY BETWEEN THE PARTIES ON A DIVORCE FROM THE BOND OF MATRIMONY.

§ 509. THE subject to be discussed in the present chapter is closely allied to the matter which occupied us in the chapter before the last. There are some of our States in which, either in connection with a decree for alimony proper, or without such decree, the court on pronouncing a divorce from the bond of matrimony may make partition, between the parties, of the property which in law was vested in the husband. This is one of the means which legislation has put into the hands of the courts for executing justice in these cases.

§ 510 [624]. Let us, then, follow up the discussion wherewith the chapter before the last was occupied; and inquire further after the principles to be applied in determining the wife's proportion, on making the division now under consideration. In Tennessee, we have seen, the doctrine is laid down substantially, to divide the property as the law would have done if the marriage had been pronounced void from the beginning,—the case being one wherein this division of property stands in the stead of alimony.¹ But this is not the rule of damages prevailing in respect to other contracts broken; except at the election of an innocent party, in circumstances wherein he is allowed to repudiate the contract altogether, and treat it as a nullity from the beginning. And often it would be unjust to send away the injured wife with

¹ Ante, § 475; *Payne v. Payne*, 4 Humph. 500. And see ante, § 474 and note.
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simply what she brought to her husband, or with it and a further sum merely in compensation for her services rendered since the marriage. Indeed, the Kentucky court has expressly decided against this rule;¹ and, in Tennessee, the doctrine would not probably be applied in circumstances where its application would be unjust to an injured wife; for in this State it has also been held, in a case which still sheds but little light on the subject, yet where no property appears to have come to the husband through the marriage, that upon a divorce *a vinculo* the wife is entitled to a fair proportion of her husband's estate for her support, and that the amount is within the legal discretion of the Chancellor, subject to the revision of the Supreme Court. But a decree substantially setting apart half the husband's land to the wife and half to him, during their respective lives, with remainder to their children, was considered to be objectionable as giving her too much, and so not warranted by law.²

§ 511. In another Tennessee case, the terms of the statute being that the judge shall "decree to the wife so divorced such part of the real and personal property of the husband as the court shall think proper," &c., it was held to be error to allow the woman a larger sum than the total amount of the husband's property. And McKinney, J., observed: "Upon a divorce of this nature [from the bond of matrimony], the wife can have no claim to the future earnings or acquisitions of the husband, any more than upon his protection, society, or other conjugal rights, or duty; he is alike discharged from them all. And if, upon the divorce, nothing can be given to her, or less than may be suitable to her rank and condition in life, by reason of the husband's poverty, it is her misfortune, to which she must submit."³

¹ Wilmore v. Wilmore, 15 B. Monr. 49.

² Robinson v. Robinson, 7 Humph. 440. This is not quite the entire decree upon the subject. But see Simons v. Simons, 23 Texas, 344; Wright v. Wright, 7 Texas, 526. And see ante, § 474, note.

³ Chenault v. Chenault, 5 Sneed, 248, 252.

§ 512 [625]. Another proposition appears to have been, to give the wife at least as much as she would be entitled to if her husband were dead; but this has nowhere been adopted as an absolute rule.¹ Perhaps, as a principle ordinarily applicable, the innocent wife should neither receive less than she brought to her husband, nor less than she would be entitled to if he were dead, leaving the way open for less in very special cases; and, on the other hand, giving her more; where more would be required on a just and cautious application, to the peculiar circumstances of the individual case, of such doctrines as were considered in our chapters on alimony.² In the Kentucky Court of Appeals, it was once observed: "What should be the proportion of each party in the division is left, by the law, in the discretion of the court. This case is one in which we think the court ought to decree as great a proportion to the wife as any which could occur would authorize. The parties are without children, and the wrong done by the defendant, by deserting the complainant, is groundless and without pretext. We think she ought to be decreed the use, for life, of one-third of his real estate, and a moiety of his personal estate."³

§ 513 [626]. Under statutes authorizing a division of the property, it is customary, at least it has been practised, to give a portion to the wife, though she is the guilty party. And this practice has sometimes been carried to the very verge, when viewed in the light of the wholesome rule, that one shall not profit by his own wrong.⁴ Thus in Alabama, the statute requires the court, on pronouncing a divorce, "to order and decree a division of the estate of the parties, in

¹ *Thornberry v. Thornberry*, 4 Litt. 251; *Jeans v. Jeans*, 2 Harring. Del. 142.

² On this subject the reader may consult the authorities cited supra, in this section, and ante, § 445-457. Also see ante, § 476-481. Also *Holmes v. Holmes*, Walk. Missis. 474, 476; *Dejarnet v. Dejarnet*, 5 Dana, 499; *Tewksbury v. Tewksbury*, 4 How. Missis. 109; *Kingsberry v. Kingsberry*, 3 Harring. Del. 8; *Maguire v. Maguire*, 7 Dana, 181; *Sanford v. Sanford*, 5 Day, 353.

³ *Fishli v. Fishli*, 2 Litt. 337. See also *Rudman v. Rudman*, 5 Ind. 63; *Wright v. Wright*, 7 Texas, 526.

⁴ Ante, § 377-379.

such way as to them shall seem just and right, having due regard to the rights of each party and their children, if any; provided, however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to real estate." And under this statute it is held, that, though the marriage is dissolved at the prayer of the husband, the guilty wife may claim a maintenance out of his property. Her share will not be as great as when she is the innocent applicant; but, it was judicially observed: "We are clear in the opinion, that no construction can be put upon the statute which would authorize the court, in any case, to do less than provide a maintenance for the wife, if the estate of the husband is sufficient for that purpose. We use the word maintenance in preference to subsistence, because we think the statute evidently contemplated something beyond the mere support. She should be enabled, if her husband's estate were such as to justify it, to live in such a manner, as that, if possible, she may regain her lost standing in society." Accordingly, where a decree dissolving the marriage was pronounced on application of the husband, for the cause of the wife's desertion,—the parties being old, their children being grown up and provided for, the personal estate being valued at \$13,685, consisting mostly of slaves, and the real being valued at \$1,800, their joint accumulation during the cohabitation, and she having no separate property,—an allowance to the wife of one-third of the personal estate absolutely, and the use of one-third of the land for her life, was deemed reasonable. And it was further held, that to grant her thus the use of this real estate was not to divest him of his title to it, within the meaning of the statute.¹

¹ Lovett v. Lovett, 11 Ala. 763. See also McCafferty v. McCafferty, 8 Blackf. 218, an Indiana case, where the court, having decreed that the complainant should pay to the defendant one hundred dollars in certain instalments, and also the costs of the suit, this was held not to be error. The judgment probably proceeded on the Revised Statutes of 1843, c. 35, § 60, p. 604, which provide, that "the court shall, in all cases subordinate to the preceding provisions, regulate the division and distribution of the estate, real and personal, between the parties, and the allowance

§ 514 [627]. In a Kentucky case, which embraced the singular element, that the court below had erroneously given the husband a divorce to which he was clearly not entitled, while the Court of Appeals had by law no power to disturb, in this respect, the decree,¹—it appearing, that the defendant wife was in every way peculiarly estimable; that she had been fraudulently removed from the home of her husband, who evidently was desirous to get rid of her; that the value of the estate she brought to him on the marriage, he being a widower with several children, and she a maiden lady, was about one thousand dollars; that the value of his estate was from twelve to fifteen thousand, consisting chiefly of land and slaves,—the latter court restored to her the property she originally possessed, and gave her seven hundred and fifty dollars besides.²

§ 515 [628]. There has been a question, whether the court, in dividing the estate, must assign to the wife a portion of it in specie; or whether her allowance may be in money, when the assignment of specific property is less convenient. A statute of Connecticut provided, that, on a divorce, “it shall be in the power of the Superior Court to assign, to any woman so separated, such reasonable part of the estate of her late husband as in their discretion the circumstances of the estate may admit, not exceeding one-third part thereof.” The provision being an old one, Brainard, J., observed con-

of alimony to the wife, or to her and the minor children committed to her care and custody, according to equity and good conscience, having also due regard to the legal and equitable rights of each party; but nothing contained in this article shall authorize the court to divest any party of their title to, or interest in, any real estate, further than is expressly specified herein.” And see *Richardson v. Wilson*, 8 Yerg. 67; *Sheafe v. Sheafe*, 4 Fost. N. H. 564.

¹ And see *Thornberry v. Thornberry*, 4 Litt. 252; *Maguire v. Maguire*, 7 Dana, 181; *Bogges v. Bogges*, 4 Dana, 307.

² *Pence v. Pence*, 6 B. Monr. 496. See, as further illustrating the topics of the foregoing sections, *Fitts v. Fitts*, 14 Texas, 443; *Trimble v. Trimble*, 15 Texas, 18; *Jackson v. Stewart*, 20 Ga. 120; *Rourke v. Rourke*, 8 Ind. 427; *Sharp v. Sharp*, 2 Sneed, 496; *Houston v. Houston*, 4 Ind. 139, 141; *Wilmore v. Wilmore*, 15 B. Monr. 49; *Kashaw v. Kashaw*, 3 Cal. 312; *Hagerty v. Harwell*, 16 Texas, 663.

cerning it: "This particular section has long received a particular construction, by which, whatever doubts I might have were the statute of recent date, I now feel myself bound. The Superior Court, in granting a bill of divorce to the wife, she being the innocent party, have, where the situation of the estate would not literally admit of an assignment of a part, uniformly decreed the payment of a sum of money. This practical construction seems clearly to be within the equity of the statute, the object of which was, a reasonable allowance to the innocent and unfortunate wife, out of the estate of an offending and unprincipled husband. A different construction would put it in the power of the husband, owning a large real estate, for the purpose of defrauding an innocent and distressed wife, to dispose of the whole, convert it into money, and leave nothing for the decree to operate upon." Therefore, where the husband was an inhabitant of the State of New York, and there owned an estate worth 4,500 dollars, but had no property in Connecticut, yet had appeared by attorney to the wife's suit; the court decreed, that he should pay her 1,500 dollars, being a sum not exceeding one-third part of his estate, together with her costs of suit, and, on failure to pay her, as a penalty, the sum of 3,000 dollars; and this was held not to be error.¹ We shall presently see, that a similar view of the question has been taken by the tribunals of Indiana and Tennessee.²

§ 516 [629]. On the other hand, the Kentucky court,—under an act which, like the Alabama one before mentioned,³ provides, that "the court, on pronouncing the decree of divorce, shall regulate and order the division of the estate, real and personal, in such way as to them shall seem just and right, having due regard to each party and the children, if any; provided, however, that nothing herein contained shall be construed to authorize the court to compel either of the parties to divest himself or herself of the title to the real

¹ *Sanford v. Sanford*, 5 Day, 353; *Lyon v. Lyon*, 21 Conn. 185, 198.

² *Post*, § 516.

³ *Ante*, § 513.

estate," — held, that the estate must be divided in specie, and that a gross sum of money in lieu thereof could not be decreed to the wife. The court also held, that it could not, in making this division, take into consideration lands situated in another State.¹ But when the same wife, the husband having lands in Indiana, brought afterward in Indiana her bill asking for a division to be made of those lands in her favor, or for alimony out of them, she was refused; and the court held, — the statutes of the two States² being alike, — that the Kentucky tribunal had jurisdiction of the whole matter; that it was not necessary, on granting a divorce, to divide the property in specie, if such division could not be conveniently or properly made; and that consequently the Kentucky tribunal could have decreed to the wife an annuity, or a gross sum of money, in consideration of the lands in Indiana; or could have assigned to her use, out of the Kentucky lands, such a share as she would be entitled to, on taking the whole into consideration. If, in point of fact, that court had failed to do her full justice, the courts of Indiana could not interfere; for the principle, that a matter once adjudicated by a competent tribunal is forever at rest, embraces not only what was actually determined, but whatever else the parties might have litigated in the cause. As a general rule, however, the division of the property should be made in specie, not by the decree of a gross sum to be paid the wife.³ Under a similar statute in Tennessee, it was held to be competent for the court to give the wife alimony, instead of a specific portion of the husband's property.⁴ In Iowa the statute provides, that, "when a divorce is decreed, the court may make such order in relation to the children and property of the parties, and the maintenance of the wife as shall be

¹ *Fishli v. Fishli*, 2 Litt. 337. See *Wilmore v. Wilmore*, 15 B. Monr. 49.

² For the statute of Indiana, see ante, § 513, note.

³ *Fischli v. Fischli*, 1 Blackf. 360; *McKinney v. McKinney*, cited 1 Blackf. 363. For later Indiana decisions, see *Rice v. Rice*, 6 Ind. 100; *Green v. Green*, 7 Ind. 113.

⁴ *Richardson v. Wilson*, 8 Yerg. 67. But see *D'Arusmont v. D'Arusmont*, 14 Law Reporter, 311, 8 West. Law Jour. 548. And see ante, § 381, 382.

right and proper." And it is held, under this statute, that, on a divorce in favor of the wife, the court has power to set off to her a part of the husband's real estate, to be held by her in fee-simple.¹

§ 517. There is a Georgia case in which a consideration of a different nature from what we have discussed, came up to influence the tribunal. The husband and wife had separated by mutual agreement, and she had taken back the property which she had brought to the marriage, being about one-sixth of the whole property; afterward, the husband proceeded against her as the guilty party in a suit for divorce; and, on a question *pendente lite*, this her former property which she had taken back was confirmed to her, and an additional sum was given her to meet the expense of the litigation, but she was allowed nothing further for temporary alimony. Said Lumpkin, J.: "When the separation by agreement took place, the wife was content to take back the property she brought into the marriage. She deemed this enough for her maintenance, and we leave her to abide by it. . . . But she did not, perhaps, anticipate a suit for a divorce; and this is an additional expense that she has been forced to incur by the husband."²

§ 518. In Georgia also, where the husband, who was libellant in a divorce case, had rendered a schedule of his property under oath, and obtained a verdict, it was held, that creditors have the first claim to the property, and after the payment of all just debts, the jury may award a portion of it to either the libellant, the respondent, or the issue of the marriage, or to all. And it was observed, that the term "either" in the statute, may mean "each" or "both."³ In Delaware it was held, that, where land is assigned to the wife upon a decree of divorce, she is entitled to the rents from the confirm-

¹ Jolly v. Jolly, 1 Clarke, Iowa, 9. As to New Hampshire, see Whittier v. Whittier, 11 Fost. N. H. 452.

² Killiam v. Killiam, 25 Ga. 186, 188. ³ Jackson v. Stewart, 20 Ga. 120.

ation of the commissioner's return.¹ The New Hampshire statute is in the following words: "Upon any decree of nullity or divorce, the court may restore to the wife all or any part of her lands, tenements, or hereditaments, and may assign to her such part of the real or personal estate of her husband, or order him to pay such sum of money, as may be deemed just and expedient." And it is held, that, under this statute, the assignment to the wife of a part of the husband's estate upon a divorce vests the title in her, the same as the assignment of a bankrupt's estate vests it in the assignee. And if the property assigned to her is a right in action, she may maintain the action in her own name.²

§ 519. Some other points will appear in the cases cited in a note,³ but it is not thought best to extend the discussion further. The views which the author expressed in the chapter before the last are so full as to render unnecessary any general disquisitions in this chapter.

¹ *Spicer v. Spicer*, 5 Harring. Del. 106.

² *Whittier v. Whittier*, 11 Fost. N. H. 452.

³ *Sheafe v. Sheafe*, 40 N. H. 516; *Logan v. Logan*, 2 B. Monr. 142; *Stewartson v. Stewartson*, 15 Ill. 145; *Bergen v. Bergen*, 22 Ill. 187; *Chapman v. Chapman*, 13 Ind. 396; *Jeans v. Jeans*, 2 Harring. Del. 142; *Elmore v. Elmore*, 10 Cal. 224; *Rourke v. Rourke*, 8 Ind. 427; *Bacon v. Bacon*, 2 Swab & T. 86; *Thomas v. Thomas*, 2 Swab. & T. 89; *Boynton v. Boynton*, 2 Swab. & T. 275; *Bent v. Bent*, 2 Swab. & T. 392.

CHAPTER XXX.

THE RESTORATION TO THE WIFE OF HER PROPERTY.

§ 520 [630]. In some of the States, the court is expressly authorized by statute to reinvest in the wife, on granting her a divorce, the property which came to the husband in consequence of the marriage.¹ Thus in Virginia, the tribunal which decrees a separation from bed and board may, among other things, "restore to the injured party, as far as practicable, the rights of property conferred by the marriage on the other." Under this provision, the Court of Appeals, reversing the decision of the court below, held, that where, before the bringing of the wife's petition on which a decree of divorce from bed and board for the husband's adultery was pronounced, some slaves which were hers before the marriage were attached by his creditors, — she had no right, as against those creditors, to have this property restored to her. The court might order a sale of as many of the slaves as, with the hire which had accrued during the pendency of the suit, would be sufficient to pay the debts due the attaching creditors, with the costs; and secure to the wife the rest of them, or the funds arising from their hire or sale, as far as practicable, having due regard to the rights of others.²

§ 521 [631]. In Delaware it was proposed, on the hearing of a wife's application for divorce, to inquire into waste committed by the husband on her land, both before and since the

¹ As to Maryland, see *Tayman v. Tayman*, 2 Md. Ch. 393.

² *Jennings v. Montague*, 2 Grat. 350. For further points, see *Sharp v. Sharp*, 2 Sneed, 496; *Whittier v. Whittier*, 11 Fost. N. H. 452.

filing of the bill. To this the counsel for the husband objected, on the ground, that, by statute, her real estate was to be restored of course; and, this counsel said, her allowance above that was to be in personal property. The court however received evidence of the waste committed after, not before, the commencement of the suit, observing: "The husband would be entitled to all the proper issues from the wife's land during the marriage; but, if he has, since the filing of the petition, wantonly wasted the inheritance, the court cannot restore to her all her lands, and make a 'reasonable allowance out of the husband's real and personal estate,' without inquiring into and compensating her for this destruction."¹ Yet we have seen,² that courts in awarding alimony to the wife, look, among other things, to the conduct of the parties toward each other during the cohabitation, and to the amount and value of the property the wife brought the husband. In this aspect, by analogy to the rules relating to alimony, it would seem to be a material fact, which should enter into the determination of the wife's allowance in the circumstances just stated, that his fund of personal property had been increased in consequence of waste committed on her real estate, before, as well as after, the commencement of her suit.

§ 522. In Massachusetts a statute having provided, that, "whenever a decree of divorce from bed and board shall be made, because of the cruelty of the husband, the wife, if there be no issue living at the time of the divorce, shall be restored to all her lands, tenements, and hereditaments, and be allowed," &c.; and a decree in favor of a wife under this statute having directed, "that she should be restored to all her lands, tenements, and hereditaments," — the statute and decree were together held to give to the wife the right to the immediate occupancy of lands belonging to her, which her husband had conveyed away by his deed; and she was per-

¹ Grubb v. Grubb, 1 Harring. Del. 516.

² Ante, § 457.

mitted to recover possession of them, by writ, against his grantee.¹

§ 523. The before-mentioned Massachusetts statute did not authorize the restoration to the wife, of the personal property which she brought to the marriage; and the Massachusetts courts did not have this authority, as to personal property, until it was given them by Stat. 1828, c. 55.² But there were cases in which this authority had been exercised before the latter statute was enacted; and, in one instance, a woman divorced brought her suit against her husband "for certain articles," says the report, "which were her property at the time [of the marriage], but of which a part had been consumed in the family of the plaintiff and the defendant, and the residue sold before the divorce." The decree of the court on which this action was founded was, "that all the real and personal property which came to the defendant [in the divorce suit] by his marriage with the plaintiff [in the divorce suit] should be restored to her." The court, without advertg to the fact that even the decree itself was unauthorized as regards the personal property, held, that it did not include such of this species of property as had been sold or consumed previous to the divorce.³

§ 524. We shall see, in the proper place, that a divorce from the bond of matrimony entitles the wife, at the common law, of its own force, and without any order of the court, to be put immediately into the possession of her real estate. There is a New York case in which a receiver of the rents and profits of certain real estate belonging to the wife had been appointed, then the wife brought against the husband her bill to dissolve the marriage by reason of his adultery; and, on her application, the receiver was ordered to pay into court, to abide the result of the divorce suit, the moneys

¹ *Kruger v. Day*, 2 Pick. 316.

² *Dean v. Richmond*, 5 Pick. 461; *Page v. Estes*, 19 Pick. 269.

³ *Dean v. Dean*, 5 Pick. 428.

which accrued from these lands. Said Chancellor Walworth: "If he [the husband] has been guilty of adultery, as she alleges in her bill, he has forfeited his right to the rents and profits of her estate, by this violation of the marriage contract. And if she succeeds in obtaining a decree for a divorce, she will be entitled, as a matter of course, to her real estate; and to the rents and profits thereof from the time of filing the bill, so far as he has not actually reduced the same to his possession."¹

¹ *Vincent v. Parker*, 7 Paige, 65, 66. See, as to the Kentucky law on the subject of this chapter, *Williams v. Gooch*, 3 Met. Ky. 486.

CHAPTER XXXI.

THE CUSTODY AND SUPPORT OF CHILDREN.

SECT. 525. Introduction.

526-544. The Custody as connected with the Divorce Suit.

545-551. The Custody where there is no Divorce.

552-559. Support of the Children under Decree of Court.

§ 525. THE former editions of this work contained a chapter upon the custody and support of the children of the marriage, as connected with, or dependent upon, the suit for divorce. It becomes necessary, in the enlargement of the scope of the entire work, to enlarge somewhat the scope of this chapter. The chapter will, therefore, contain some discussion of the subject as it relates to the custody where the parties are living separate without divorce. We shall divide what is to be said, as follows: I. The Custody as connected with the Divorce Suit; II. The Custody where there is no Divorce; III. The Support of the Children under Decree of Court.

I. The Custody as connected with the Divorce Suit.

§ 526 [631 a]. The subject of the custody of the children during the proceedings for a divorce, and after their termination, did not in England until recently belong properly to the divorce law; the Ecclesiastical Courts never having had jurisdiction over this matter. But by the statute establishing the present Matrimonial Court, Stat. 20 & 21 Vict. c. 85, § 35, it was provided, that, "in any suit or other proceedings for obtaining a judicial separation or a decree of nullity of

marriage, and on any petition for dissolving a marriage, the court may, from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit or other proceeding; and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery." Afterward, by Stat. 22 & 23 Vict. c. 61, § 4, it was further provided, that "the court, after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provisions with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending;"—one of the objects of this latter provision being to enable the judge to vary his decree respecting the custody, from time to time, after the main cause is disposed of, as altered circumstances may require.¹ In the United States, the divorce statutes generally give to the tribunal hearing a divorce cause power to direct, during its pendency and afterward, with which of the parties, or with what other person, the children shall be, and to make provision out of the husband's estate for their maintenance.

§ 527 [632]. The father is, at common law, in some sense, the guardian of his minor children, though in precisely what sense the books seem not to be agreed.² When he dies,

¹ That this could not be done under the former of the two acts, see *Robotham v. Robotham*, 1 Swab. & T. 190; *Seymour v. Seymour*, 1 Swab. & T. 332; *Curtis v. Curtis*, 1 Swab. & T. 192; *Suggate v. Suggate*, 1 Swab. & T. 492.

² *Macpherson on Infants*, 52-62; *Miles v. Boyden*, 3 Pick. 213; *Kenningham v. McLaughlin*, 3 T. B. Monr. 30; *Forsyth v. Kreakbaum*, 7 T. B. Monr. 93;

the guardianship devolves, not to its full extent, on the mother;¹ but partly so, and whatever guardianship is hers, it has been held, perhaps not justly, continues in her, though she is married a second time.² Concerning the latter point, a difficulty arises from the fact, well settled in law, that the second husband is not under obligation to support the wife's children by a former husband, while also he is entitled neither to their services nor their society.³ And indeed other authority recognizes the doctrine, that the second marriage deprives, to some extent at least, the mother of her right of custody over her children by the former marriage.⁴

§ 528 [632]. The father is likewise under a strong moral obligation, which the law recognizes, to provide sustenance for his minor children; to whose earnings he is entitled, while he maintains them, but no longer.⁵ At the common law he may assign to another their services during minority;⁶

Isaacs v. Boyd, 5 Port. 388; *Wilson v. Wright*, Dudley, Ga. 102; *Griffing v. Hopkins*, Walk. Mich. 49; *Jackson v. Combe*, 7 Cow. 36.

¹ *Macpherson on Infants*, 60, 65; *Eyre v. Shaftsbury*, 2 P. Wms. 103, 116; *Roach v. Garvan*, 1 Ves. sen. 157, 158; *Mendes v. Mendes*, 3 Atk. 619, 624, 1 Ves. 91; *Dedham v. Natick*, 16 Mass. 135, 140; *Whipple v. Dow*, 2 Mass. 415; *Heyward v. Cuthbert*, 4 Des. 445; *Tilton v. Russell*, 11 Ala. 497; *Jones v. Tevis*, 4 Litt. 25; *Osborn v. Allen*, 2 Dutcher, 388; *Curtis v. Curtis*, 5 Gray, 535.

² *Villareal v. Mellish*, 2 Swaust. 533; *Mellish v. De Costa*, 2 Atk. 14; *Armstrong v. Stone*, 9 Grat. 102; *The State v. Scott*, 10 Fost. N. H. 274.

³ *Tabbe v. Harrison*, 4 T. R. 118; *Worcester v. Merchant*, 14 Pick. 510; *Commonwealth v. Hamilton*, 6 Mass. 273; *Williams v. Hutchinson*, 5 Barb. 122, 3 Comst. 312; *Brush v. Blanchard*, 18 Ill. 46.

⁴ *The State v. Scott*, 10 Fost. N. H. 274.

⁵ *Benson v. Remington*, 2 Mass. 113; *Nightingale v. Withington*, 15 Mass. 272, 275; *Bishop v. Shepherd*, 23 Pick. 492; *Wodell v. Coggeshall*, 2 Met. 89; *Shute v. Dorr*, 5 Wend. 204; *Morse v. Welton*, 6 Conn. 547; *Chase v. Smith*, 5 Vt. 556; *Emery v. Gowen*, 4 Greenl. 33; *The Etna, Ware*, 462; *Lord v. Poor*, 23 Maine, 569; *Steele v. Thatcher*, Ware, 91; *Stone v. Pulsipher*, 16 Vt. 428; *Godfrey v. Hays*, 6 Ala. 501; *White v. Henry*, 24 Maine, 531; *Bell v. Hallenbeck*, Wright, 751; *Ford v. Monroe*, 20 Wend. 210; *Hoover v. Heim*, 7 Watts, 62; *Wilt v. Vickers*, 8 Watts, 227; *Jennison v. Graves*, 2 Blackf. 441; *Kennard v. Burton*, 25 Maine, 39; *Canovar v. Cooper*, 3 Barb. 115; *Plummer v. Webb*, Ware, 75; *Stovall v. Johnson*, 1 U. S. Mo. Law Mag. 528.

⁶ *Day v. Everett*, 7 Mass. 145; *Phelps v. Townsend*, 8 Pick. 392; *The State v. Shreve*, Coxé, 230.

but in many of our States he cannot do this, except in pursuance of the provisions of statutes.¹ Likewise the mother, being a widow, is entitled to the labor of her children while she supports them;² but there is doubt, whether she, like the father, can assign their labor to another.³ In England, and generally in this country, perhaps universally, there are statutes under which the father may be compelled, if of sufficient ability, to maintain his children;⁴ but it is a proposition which some tribunals have with great strength of reason and authority maintained, that the common law, though for many purposes recognizing this obligation, cannot enforce it in any civil proceeding. And though it is a popular opinion, which has found its way into the ranks of the legal profession, that a father may be charged for necessities furnished his minor child against his consent, the same as the husband may, for necessities furnished his wife; yet the contrary has been by some courts held, it being contended, that the relation of father and child is not the same in this respect as of husband and wife.⁵ And while this doctrine is perhaps correct, it is much encumbered by apparent authority the other way.⁶ The

¹ There are many authorities on this point. See *Commonwealth v. McKeagy*, 1 Ashm. 248.

² *Volentine v. Bladen*, Harper, 9; *Dedham v. Natick*, 16 Mass. 135, 139; *Burk v. Phips*, 1 Root, 487; *Jones v. Tevis*, 4 Litt. 25. Contra, *Commonwealth v. Murray*, 4 Binn. 487, 488.

³ *Morris v. Low*, 4 Stew. & P. 123.

⁴ 2 Kent, Com. 190.

⁵ *Cooper v. Martin*, 4 East, 76, 84; 1 Bl. Com. 448, note of Christian and others; *Gordon v. Potter*, 17 Vt. 348. This is a carefully considered case; and the court reject the doctrine of the father's liability for necessities furnished the minor child, against his consent, both on reason and a mass of English authority. The English cases cited by the court, to this point, are *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Baker v. Keen*, 2 Stark. 501; *Fluck v. Tollemache*, 1 Car. & P. 5; *Rolfe v. Abbott*, 6 Car. & P. 286; *Law v. Wilkin*, 6 Ad. & E. 718; *Blackburn v. Mackey*, 1 Car. & P. 1; *Seaborne v. Maddy*, 9 Car. & P. 497; *Mortimore v. Wright*, 9 Lond. Law Jour. 158. See also *Hunt v. Thompson*, 3 Scam. 179.

⁶ 2 Kent Com. 191-193; *Van Valkenburg v. Watson*, 13 Johns. 480; *Stanton v. Willson*, 3 Day, 37; *Hillsboro' v. Deering*, 4 N. H. 86, 95; *Pidgin v. Cram*, 8 N. H. 350; *Owen v. White*, 5 Port. 435. And see *Addison v. Bowie*, 2 Bland, 606; *Newport v. Cook*, 2 Ashm. 332; *Dupont v. Johnson*, 1 Bailey Ch. 274; *Myers v. Myers*, 2 McCord Ch. 214, 264; *Cruiger v. Heyward*, 2 Des. 94; *Cowls v. Cowls*, 3 Gilman, 435; *Dawes v. Howard*, 4 Mass. 97; *Smith v. Young*, 2 Dev. & Bat.

purposes of this chapter are not such as to demand of us the careful examination necessary to draw the line clearly in the midst of this conflict of opinion. Yet in reason, though the father might in law be compelled to support his children, by a process instituted for that purpose, still, to allow the child to pledge the father's credit against the father's consent, would be to encourage disobedience in one not arrived to years of discretion. On the other hand, the wife has reached her years of discretion, while, though in a sense she is to be obedient to her husband, she is not to be so in precisely the same sense as a minor child. At the same time, though the authority of the child thus to bind the parent may not be commensurate with that of the wife to bind the husband, the law may give to a person relieving a suffering child the right, in some circumstances, to collect the bill of the father. Where, of course,* the parent neither refuses nor neglects to provide the child with necessities, no third person can furnish them at the parent's charge.¹

§ 529 [633]. There is also a sense in which, *prima facie*, the father is entitled, not only as against the rest of the world,² but as against the mother likewise, if the parents are living apart, to the custody of the children, of both sexes, during the entire period of their minority. But this right is not an absolute one; and it is usually made to yield when the good of the child, which, especially according to the modern American decisions, is the chief matter to be regarded, requires it

26; *Collins v. Strunker*, 1 U. S. Mo. Law Mag. 114. "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law and by the common law of England to support and provide for his wife." Metcalf, J., in *Dennis v. Clark*, 2 Cush. 347, 352. See further, as to Massachusetts, *Hancock v. Merrick*, 10 Cush. 41.

¹ *Eitel v. Walter*, 2 Bradf. 287.

² *Sumner v. Sebec*, 3 Greenl. 223; *Commonwealth v. Nutt*, 1 Browne, Pa. 143; *Kiffin v. Kiffin*, cited 1 P. Wms. 697, 705; *Macpherson on Infants*, 143; *Allen v. Coster*, 1 Beav. 202; *Wellesley v. Wellesley*, 2 Bligh, n. s. 124; *Whitfield v. Hales*, 12 Ves. 492, and note to Sumner's ed.

should yield.¹ If a father turns his child out upon the world without caring for him, he relinquishes thereby his parental right to the custody of the person of the child, whom he thus absolves also from the duty of filial obedience.² And the law may require a father to support his children, after he has forfeited his right to their control or custody.³ But this subject belongs to our next sub-title, rather than this; and it is mentioned here only by way of introduction to the matter now directly in hand.⁴

¹ *The State v. Smith*, 6 Greenl. 462; *United States v. Green*, 3 Mason, 482; *Matter of Kottman*, 2 Hill, S. C. 363; *People v. Mercein*, 3 Hill, N. Y. 399, 8 Paige, 47; *The State v. Paine*, 4 Humph. 523; *Steele v. Thacher*, Ware, 91; *People v. Chegaray*, 18 Wend. 637; *People v. —*, 19 Wend. 16; *Matter of Toulmin*, R. M. Charl. 489; *Mercein v. People*, 25 Wend. 64; *The State v. Clover*, 1 Harrison, 419; *Rex v. Greenhill*, 6 Nev. & M. 244; *De Manneville v. De Manneville*, 10 Ves. 52, and note to Sumner's ed.; *Ball v. Ball*, 2 Sim. 35; *Jackson v. Hawkey*, Jacob, 264; 2 Kent Com. 194; *Wood v. Wpod*, 3 Ala. 756; *The State v. King*, 1 Ga. Decis. 93; *Rex v. Delaval*, 3 Bur. 1434, 1436; *Wellesley v. Beaufort*, 2 Russ. 1, affirmed in the H. of Lords, 1 Dow & Cl. 152; *Rex v. De Manneville*, 5 East, 221; *Rex v. Moseley*, 5 East, 224, note; *Holcombe's Eq.* 259; *Commonwealth v. Maxwell*, 6 Law Reporter, 214; *Ex parte Schumpert*, 6 Rich. 344; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 497. And see a very recent English case, of great interest, in which the Vice-Chancellor says: "When the court refuses to give possession of his children to the father, it is the paramount duty of the court to do so for the protection of the children themselves; and the court will perform that duty if the father has so conducted himself, as that it will not be for the benefit of the infants that they should be delivered to him,—or if their being with him will affect their happiness,—or if they cannot associate with him without moral contamination,—or if, because they associate with him, other persons will shun their society." *Anonymous*, 2 Sim. n. s. 54, 11 Eng. L. & Eq. 281, 290. And see, further, *The State v. Stigall*, 2 Zab. 286; *In re Hakewell*, 22 Eng. L. & Eq. 395; *People v. Porter*, 1 Duer, 709; *Tarkington v. The State*, 1 Ind. 171; *Lindsey v. Lindsey*, 14 Ga. 657; *In re Hakewell*, 15 Eng. L. & Eq. 599; *The State v. Scott*, 10 Fost. N. H. 274; *Gishwiler v. Dodez*, 4 Ohio State, 615.

² *Stansbury v. Bertron*, 7 Watts & S. 362. And see *Shelley v. Westbrooke*, Jacob, 266; *Wellesley v. Beaufort*, 2 Russ. 1; *Mytton v. Holyoake*, cited *Macpherson on Infants*, 149; *Clinton v. York*, 26 Maine, 167.

³ *Macpherson on Infants*, 142; *Cowls v. Cowls*, 3 Gilman, 435.

⁴ The reader will find the English authorities collected in *Shelford Mar. & Div.* 677 et seq.; in *Forsyth on the Custody of Infants*; and, in part, in the present chapter under our next sub-title. I have not in this section undertaken to state the doctrines with more than general accuracy; neither have I thought it well to trace them into the numerous subtle and technical distinctions by which their general equity is sometimes made to vanish from practical observation.

§ 530 [634]. As already observed,¹ this matter of the custody of children, during and after a suit for divorce between the parents, is to be regulated, in the States generally of this country, by the court hearing the divorce cause, according to its discretion. The statutes provide in substance, that, during the pendency of such a suit, and also on the final decree for a divorce or separation, the court may make any proper order concerning the custody, care, education, and maintenance of the minor children of the marriage; which order may be modified or changed from time to time, like a decree for alimony.² Probably both the intent and effect of every such statutory provision is to abrogate, in cases to which it is applicable, any superior common-law right the father has, over the mother, to the custody of their mutual offspring. "I look upon this statute," observes Hoffman, Assistant V. C., "especially when a decree has been pronounced for a separation, as neutralizing the rule of the common law; as annulling the superiority of the *patria potestas*, and placing the parents on an equality as to the future custody of the children, even if it does not create a presumption in favor of the wife," where she is the injured party. "And this is the case, because no decree for a separation can be pronounced, without evidence of such a violation of duty in one relation of life as implies a probability of the disregard of every other."³

§ 531 [635]. We have observed also,⁴ that the English ecclesiastical tribunals never had the jurisdiction thus committed to our courts, on the hearing of divorce causes. In England, while divorce causes were heard in those courts, the powers now under consideration were exercised, imper-

¹ Ante, § 526.

² Cook v. Cook, 1 Barb. Ch. 639; Codd v. Codd, 2 Johns. Ch. 141; Laurie v. Laurie, 9 Paige, 234; Barrere v. Barrere, 4 Johns. Ch. 187; Hansford v. Hansford, 10 Ala. 561; Paige on Div. 302; Collins v. Collins, 2 Paige, 9.

³ Ahrenfeldt v. Ahrenfeldt, 1 Hoffman, 497. So under the English Stats. 20 & 21 Vict. c. 85, § 35, it was by Sir C. Creswell observed: "The application here is not to enforce the common-law rule, but to the discretion of the court." Spratt v. Spratt, 1 Swab. & T. 215. And see post, § 538.

⁴ Ante, § 526.

fectly and partially, by the equity and common-law tribunals of the country; the Ecclesiastical Courts going merely to the extent, in some instances, where, for very clear reasons the mother should be permitted to retain the child, of refusing in the award of alimony to consider, as diminishing the amount, that the husband will have the child to support.¹ But there is a question, whether, when the jurisdiction over a cause of divorce is committed to a court of equity, that court may not, without further statutory aid, determine in the divorce suit the matter of the custody of the children. Those equity tribunals which have granted alimony without authority from express statutes,² have exercised, in the same suit, this jurisdiction also.³ So where there were two statutes, "the one providing for the disposition of the children in all cases of separation, when neither party shall obtain a divorce; the other, investing the Court of Chancery with power, in cases of separation, to determine the same questions with respect to the children, upon the petition of either party," — it was decided, that this matter might be adjudicated in the divorce suit.⁴

§ 532 [636]. The courts have not laid down exact rules to guide their discretion concerning which of the parties, on a divorce, shall be intrusted with the custody of the children; probably the subject admits not of such rules. The leading doctrine is to consult the good of the children, rather than the gratification of the parents.⁵ Therefore an agreement on this subject, between the parents, before the decree of divorce is rendered, can have no controlling influence; for they are not the persons whose interests are primarily to be consulted.⁶ The proposition is generally true, that one who

¹ *Greenhill v. Greenhill*, 1 Curt. Ec. 462, 6 Eng. Ec. 376, 378; *Smith v. Smith*, 2 Phillim. 152, 1 Eng. Ec. 220; ante § 465.

² Ante, § 354 et seq.

³ *Williams v. Williams*, 4 Des. 183; *Anonymous*, 4 Des. 94; *Prather v. Prather*, 4 Des. 33.

⁴ *Hansford v. Hansford*, 10 Ala. 561, 563.

⁵ *Barrere v. Barrere*, 4 Johns. Ch. 187; *Cook v. Cook*, 1 Barb. Ch. 639; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 497. . And see *Trimble v. Trimble*, 15 Texas, 18.

⁶ *Cook v. Cook*, 1 Barb. Ch. 639. And see *People v. Mercsin*, 3 Hill, N. Y. 399.

has conducted either well or ill in a particular domestic relation, will conduct the same in another; and so, as a general practice, the courts give the custody to the innocent party; because, with such party, the children will be more likely to be cared for properly.¹

§ 533 [637]. The influence of example, especially the example of parents, is controlling over the minds of young children;² so when a husband had introduced a mistress into his house, under the observation of his children, the court gave the custody of the daughters to the wife, — not including the sons in the order.³ It has been considered, that a single act of adultery would not of itself exclude a husband, absolutely and forever, from the care of his infant children, if the court should be satisfied he had abandoned his licentious intercourse, becoming thoroughly reformed.⁴ And in Pennsylvania it has been held, that, after a divorce from the bond of matrimony has been granted the husband, on account of the wife's adultery, it is not a matter of course for the court, on a writ of *habeas corpus*, to remove the children from her custody into his, even though she is living in adultery. The court will look into the circumstances, and make such order as the good of the children requires. And, in a

¹ *Bedell v. Bedell*, 1 Johns. Ch. 604; *Kingsberry v. Kingsberry*, 3 Harring. Del. 8; *Codd v. Codd*, 2 Johns. Ch. 141; *Jeans v. Jeans*, 2 Harring. Del. 142, where there were two daughters and one son, and the court gave to the plaintiff wife the custody of the daughters only; *Clark v. Clark, Wright*, 225; *Hansford v. Hansford*, 10 Ala. 561; *Bascom v. Bascom, Wright*, 632; *People v. Mercein*, 8 Paige, 47; *Richmond v. Richmond*, 1 Green Ch. 90; *Cook v. Cook*, 1 Barb. Ch. 639.

² See *Barrere v. Barrere*, 4 Johns. Ch. 187, 197; *Anonymous*, 2 Sim. x. s. 34, 11 Eng. L. & Eq. 281.

³ *Williams v. Williams*, 4 Des. 183. This was a suit for alimony only, not for divorce. Probably on decreeing a divorce in such a case, the courts generally would commit the care of the sons as well as the daughters to the mother. Where parties had lived together unhappily, and on the whole the court saw proper to grant alimony to the wife, who, on account of matrimonial differences, had left her husband, he was permitted to have the nurture and education of the child, a daughter, under his own control; she to have access to her. *Anonymous*, 4 Des. 94, 102.

⁴ *Cook v. Cook*, 1 Barb. Ch. 639.

case of this sort, the court refused at first to take the children from the mother;¹ but, on a subsequent application, three years having been added to their age, and the father's circumstances having slightly changed, they were committed to him.² So the Ohio court, on decreeing a divorce for a single act of adultery by the wife, where there was hope of her reformation, committed the younger child to her, giving the custody of the other to the father.³ The like order was made in a case of not very flagrant desertion by the wife; who was to be permitted, also, intercourse with such of the children as were intrusted to the father's care.⁴

§ 534 [638]. Sometimes a person not altogether worthy to have the charge of children obtains a divorce from another, also unworthy; and then the court may be compelled to choose between parties neither of whom would be selected but from necessity. Thus, where a divorce from the bond of matrimony was granted to the husband for the wife's adultery, the custody of the child was intrusted to him; although an ill-tempered man, who had abused his wife by whom he had been forgiven; and although he had killed, in cold blood, and "in a manner both cruel and inhuman," the person with whom the adultery was committed.⁵ So, on the other hand, the court may have to choose between two persons against neither of whom there is any clear objection, as respects the interests of the children. In a New York case, which bore somewhat this complexion, it was intimated by the Assistant Vice-Chancellor, who pronounced, at the suit of the wife, a decree separating her from her husband on account of his desertion and neglect to provide for her, that perhaps, under the statute, the children might be made wards of court, with proper guardians appointed, and the right of access of the

¹ *Commonwealth v. Addicks*, 5 Binn. 520.

² *Commonwealth v. Addicks*, 2 S. & R. 174. In *Valentine v. Valentine*, 4 Halst. Ch. 219, the custody of a child was at first given to the mother on account of its tender years, and afterward transferred to the father.

³ *Dailey v. Dailey*, Wright, 514, 517.

⁴ *Leavitt v. Leavitt*, Wright, 719.

⁵ *J. F. C. v. M. E.*, his wife, 6 Rob. La. 135.

parents to them regulated. He proposed, however, to make an order with the husband's concurrence, the effect of which would be to give a sort of equal custody to the parties. But the husband refused to concur, though anxious to have the sole care of the children, and so they were committed to the mother.¹

§ 535. The statutes under which the present English Matrimonial Court proceeds, as respects the custody of the children of parties litigant, and of parties who have obtained a divorce, were mentioned at length in one of our preceding sections.² And there have been adjudged, under them, some points to which our attention may be profitably directed. In one case it was held, that, on an application concerning the custody, in a divorce case, *pendente lite*, the court will not receive affidavits respecting such matters as are involved in the yet undetermined suit between the parents, though it will look into the other matters, which, on general principles, should influence the decision. "It would be most mischievous," said the court, "to prejudice, by discussion on the present motion, points which might hereafter be in issue before the jury." And it was added "that the duty of the court was to look at all the actual circumstances of the present application: the age of children, the position in which they find themselves in relation to other members of the family, the fact that a suit is pending between the parents in which such and such charges are made on both sides; but not to attempt to ascertain the truth or falsehood of the charges."³

§ 536. The interim custody under the statute is not always or necessarily given to either of the parents; but, whoever has the custody, both the parents are generally permitted access to them.⁴ In like manner, where the question comes

¹ Ahrenfeldt v. Ahrenfeldt, 1 Hoffman, 497.

² Ante, § 526.

³ Ryder v. Ryder, 2 Swab. & T. 225, 227.

⁴ Boynton v. Boynton, 1 Swab. & T. 324; Curtis v. Curtis, 1 Swab. & T. 75, 77.

up, upon the termination of the case, as to the permanent custody, the court seems pretty generally inclined to permit the parent deprived of the custody for the purpose of giving it to the other parent, to have access to the children at such times, and under such regulations, as the decree of the court specifies.¹ Under the statute, the court has power, pending the suit, to make simply an order for access, in favor of one of the parties, where this is the only thing asked for; but, in one case, the Judge Ordinary, on the facts, declined to make such an order, and the whole court refused to interfere.² Likewise, where a divorce from the bond of matrimony has been pronounced for the adultery of the wife, she cannot have the custody of the children, or any order for access to them; but the reason in law is, that, by Stat. 2 & 3 Vict. c. 54, which empowers the chancery tribunals to give to mothers access to their infant children, it is in § 4 enacted, "That no order shall be made by virtue of this Act whereby any mother against whom adultery shall be established, by judgment in an action for criminal conversation at a suit of her husband, or by the sentence of an Ecclesiastical Court, shall have the custody of any infant, or access to any infant." And Sir C. Cresswell observed: "I think that that enactment establishes a precedent that I ought to follow, and that where a wife has been found guilty of adultery, I ought not to order that she have access to her children."³

§ 537. In one case, on a decree for a judicial separation in favor of the wife for the husband's cruelty, the court, Sir C. Cresswell, gave the custody of the children to the wife, observing: "The conclusion to which I have arrived is, that the wife, as an injured party, had good ground for seeking a judicial separation, and that she ought not to obtain it at the expense of losing the society of her children; that I am

¹ *Suggate v. Suggate*, 1 Swab. & T. 492; *Boynton v. Boynton*, 2 Swab. & T. 275, 277; *Marsh v. Marsh*, 1 Swab. & T. 312.

² *Thompson v. Thompson*, 2 Swab. & T. 402.

³ *Clout v. Clout*, 2 Swab. & T. 391; *s. p.* *Bent v. Bent*, 2 Swab. & T. 392.

not satisfied that her habits or conduct are such as to render her in any way unfit to have charge of them; that, with respect to the respondent, if he is deprived of the society of his children, that is the consequence of his own misconduct. . . . I order, that they be kept in her custody until they respectively attain the age of fourteen years; the father to be kept informed from time to time of the place or places where the children are residing, and to have access to them once a week for two hours, between 10 A. M. and 4 P. M., in the presence of some person to be appointed for that purpose by the petitioner."¹

§ 538. In another case, this learned person employed still other language from which useful hints may come to us respecting the interpretation of our own statutes on this subject, though the matter of discussion related to the words "just and proper" in the English enactment. "This," he said, "is not a general power of dealing with the custody of children; it exists only where there is a suit for obtaining a judicial separation, a decree of nullity, or dissolution of a marriage. I apprehend, therefore, that the words 'just and proper' are to be construed with reference to the circumstances affecting the suit, and not merely with reference to the rules by which courts of equity and common law have been governed in questions respecting the custody of infants; in short, that it was the intention of the Legislature to give a discretionary power to the court exceeding that which had been previously exercised by courts of law and equity . . . I think it would not be just to compel the unoffending mother to resort to any place where the father might choose to place them—perchance to his own house—for the purpose of seeing them. If he is put to any trouble about going to see them, that will arise from his own misconduct; and, therefore, although it does not appear that he was ever guilty of any cruelty or unkindness to his children, and there may not at present be any fear of their being contaminated by his

¹ *Suggate v. Suggate*, 1 Swab. & T. 492, 496, 497.

evil example, I think it just and proper that they should remain under the control of their mother so long as she has the means of giving them a suitable education, and the inclination to do so. I therefore make it part of my decree, that the children shall remain in the custody and under the control of their mother, the petitioner, until the age of fourteen, when they may by law exercise their own choice in the matter, provided she keeps and maintains at school such of them as are of a fit age to be sent there, without subjecting her husband to expense. The husband always to have information of the schools at which they are placed, and to have the same access to them there as is allowed to the parents of other children at the same schools. As long as any one of them is kept by its mother at her home, as being too young to be sent to school, the respondent to have access to it there once a week at any reasonable hour.”¹

§ 539. In the form of the Petition for Divorce, adopted by the present English Matrimonial Court, and promulgated with the Rules and Orders of the court, the following words occur: “That your petitioner and his said wife have had issue of their said marriage three children, to wit, one son and two daughters;” and a recent English writer says, that the ages of the children should be mentioned in the petition,² though nothing appears of the ages in the form given by the court. The same writer³ observes: “Where a decree of judicial separation or dissolution of marriage has been pronounced at the suit of the wife, application may be made at once for further orders respecting the custody of or access to the children, if they are already in the custody of the petitioner or respondent by order of the court. If no interim orders have been made respecting them, the application must be on petition.⁴ The petition must be filed and notice served on

¹ *Marsh v. Marsh*, 1 Swab. & T. 312, 316, 317; concurred in by the whole court in *Boynton v. Boynton*, 2 Swab. & T. 275, 277.

² *Browning Div. Pract.* 111, 136.

³ *Ib.* 91, 92.

⁴ *Anthony v. Anthony*, 30 Law J. N. S. Mat. 208.

the respondent, that the petitioner will on such a day pray the judgment of the court on the petition.¹ But if a prayer for the custody of the children has been embodied in the petition for judicial separation or dissolution of marriage, and such petition has been served on the respondent, and no appearance has been entered, further notice of the application is not necessary; but the court will, on making its decree, give the custody of the children to the petitioner."²

• § 540. We have already seen, that the petition or libel or bill for divorce need make no mention of the matter of alimony;³ and the writer is persuaded, that, as a question of correct pleading, on general principles, the same is true of the children of the marriage, whose custody is sought by one or the other of the parties. Yet as there will not often be a contest upon the fact of the existence and ages of the children, while almost of course the amount if not the existence of the faculties will be contested, and as in the one case the matter, can be set out in a few words while in the other it requires many words, not to speak of still other reasons, that form of the plaintiff's pleading which mentions the children and their ages is, on the whole, to be approved in practice, or, at least, it is to be deemed well enough. The writer is able to say, that the American libel not unfrequently contains this allegation with respect to children. There are, however, no adjudications upon the point.

§ 541 [641]. There are on this subject a few cases, English and American, not cited to the foregoing sections; but none of them contain matters of any particular importance, and it is not deemed best to encumber these pages further with cases now. The course of this department of legal learning is onward, and the author hopes to be able in some future edition, when further decisions are added to those we have, to present the whole subject in a more complete form than it

¹ *Stacey v. Stacey*, 29 Law J. n. s. Mat. 63, 8 W. R. 341.

² *Wilkinson v. Wilkinson*, 30 Law J. n. s. Mat. 200, note.

³ Ante, § 486 et seq.

would be possible for him to give it here. Yet seeing the light to be gathered from the decisions is so feeble and uncertain, let us look a little at the matter in the light of those principles which lie inherent in the subject. While the parents are living together in harmony, nature has her demands in behalf of the children satisfied by the equal society, care, and control which necessarily they have in respect to the common offspring. And as nature always looks toward the future; as all her arrangements, in every department of existence, concern primarily the to-be, rather than the is or the was; so in an especial manner is it in her arrangements connected with the institution of marriage. The parents have already received those early impulses which are to carry them through life; but the children await the intellectual and moral forces, which, imparted to them, are to determine their hereafter. Consequently the interests of the children are to overshadow all other interests, in that congregation of reasons and of facts whence the judge is to draw his decision of the question of their custody. And though, in a case of balanced interest in the children, the court should consider with which parent is the stronger parental claim; yet, when the interest is not balanced, their own good should lead the decree fixing their custody.

§ 542 [642]. Suppose, in the first place, the interest of the children to be balanced. With which of the parents, in such a case, is the stronger parental claim? Both united in giving being to the children; both, each in his or her particular way, have nourished and supported them; both have their affections drawn toward the objects thus brought into existence, and thus nourished and supported. And nature knows no difference, in these respects, between the claims of the parents. The doctrine is familiar, that the common law, unamended by statutes or modern precedents, makes the father's rights paramount, under ordinary circumstances, to the mother's. In this doctrine, the common law wears somewhat the grim aspect put on in its early days by reason of its dwelling among baronial castles, in contact with feudal manners, tossed
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in the storms, and torn in the outbursts, of half-civilized life. But a further consideration is, that the common law has intrusted to the husband the property belonging to the married pair; and, when the question of the custody of children has come before the common-law tribunals, it has usually come under circumstances in which the judge has had authority simply to determine the custody, without power over the property whence the children were to be supported. And in such a case, plainly the child must ordinarily be put where its hand could reach the food necessary to sustain it, and the clothes to warm it, where also its foot could press the floor of the school to instruct it. The good of the child, in such a case, would thus ordinarily be best promoted with the father; and, in the indistinct and half erroneous language in which truth is often clothed, the expression, that the husband's claim is paramount to the wife's, was not unnatural; neither was it unnatural that the courts, following precedent, should follow the letter of such a precedent, thus expressed, rather than its spirit.

§ 543 [643]. When one of the married parties leaves the other, such party leaves either rightfully or wrongfully. Assuming a cause for leaving to exist, it, according to the doctrine laid down in our chapter in the first volume on Desertion,¹ would entitle the party to obtain, on suit, a divorce from the other for the cause; since, according to this doctrine, no desertion is justifiable in law unless cause for divorce exists. If cause for divorce does exist, then the deserting one, to avail himself of it, even in a suit concerning the custody of the children, must bring the divorce suit; without which suit brought, the court could not assume the desertion to be without just cause. To this point, substantially, we have judicial authority.² After suit brought, and the result of the litigation ascertained, the court should consider the claims of the innocent party to be superior to those of the guilty.

¹ Vol. I. § 795 et seq.

² *Commonwealth v. Briggs*, 16 Pick. 208. And see *People v. Humphreys*, 24 Barb. 521. See post, § 548.

§ 544 [643 a]. Thus stands the question as between the parents. Looking at the interests of the children, we have the following views: During the very young years, especially in the case of girls, the mother can best take care of them, in ordinary circumstances. But in later years, they need the sterner discipline of the father. Yet neither in the case of the younger children, nor in that of the older, are these propositions to be carried to all lengths. The party who has behaved well in the marriage relation will be likely to behave well also in the parental; therefore this party should usually have the care of the children.

II. *The Custody where there is no Divorce.*

§ 545. The foregoing sections of the present chapter, though standing under the sub-title of *The Custody as connected with the Divorce Suit*, have in truth presented most of the leading doctrines connected also with the present sub-title. There are, on the other hand, some questions which would properly enough fall within the discussions of this sub-title, into which questions it will not be wise to enter, because of their particular and more intimate connection with departments of the law foreign to the purposes of these volumes.

§ 546. The old common-law rule has been already mentioned, that the father is to be deemed to have a claim superior to the mother's, over the persons and to the custody of the minor children.¹ But it has been mentioned also, that this is a claim which, like any other, he may forfeit, or bar himself of, by his wrongful conduct, or his incapacity to execute well the trust. The right of the father likewise is subordi-

¹ Ante, § 539, 542; *Rex v. De Manneville*, 5 East, 221; *Ex parte McLellan*, 1 Dowl. P. C. 81; *Rex v. Greenhill*, 6 Nev. & M. 244, 4 Ad. & E. 624; *Ball v. Ball*, 2 Sim. 35; *Ex parte Boas*, 31 Ala. 425; *People v. Olmstead*, 27 Barb. 9; *The State v. Paine*, 4 Humph. 523; *Ex parte Hewitt*, 11 Rich. 326; *People v. Mercein*, 3 Hill, N. Y. 399.

nate to the interest of the public in the well-being of the child; wherefore, for this reason, where the well-being of the child, in which the community is interested, requires, the custody of the child may be taken from the father.¹ Sometimes, therefore, the custody will be given to a third person, in preference either to the father or mother.²

§ 547. The reader perceives, therefore, that, even at the common law, this question of the custody of children is a thing much within the discretion of the particular judge before whom the particular matter is litigated. It would be interesting here to follow out the cases in their details, and see how, under different circumstances, the same judges have given the custody to one or the other of the married parties, as the circumstances in their view dictated; and how, on the other hand, different judges, under like circumstances, have decided differently. But this would occupy too much of our space; so, therefore, let us direct attention to a few points, and thus close the present sub-title.

§ 548. It was mentioned a little way back,³ that, according to some views, when the question comes up as between husband and wife who are living apart, the court cannot inquire by whose fault the separation was brought about, for the purpose of showing a superior claim in the one innocent of the fault; because, if there was such fault as the law could notice in this aspect of the question, the innocent party should show the fault in a suit brought against the other for a divorce. There are cases, however, which seem to proceed upon the contrary doctrine; and, aside from this, the good or

¹ *Ex parte Bailey*, 6 Dowl. P. C. 311; *Rex v. Dobbys*, 4 Ad. & E. 644, note; *Rex v. Wilson*, 4 Ad. & E. 645, note; *Blisset's case*, Loft, 748; *Whitfield v. Hales*, 12 Ves. 492; *Lyons v. Blenkin*, Jacob, 245; *Wellesley v. Beaufort*, 2 Russ. 1; *Matter of Toulmin*, R. M. Charl. 489; *Bryan v. Bryan*, 34 Ala. 516; *People v. Chegaray*, 18 Wend. 637; *People v. —*, 19 Wend. 16; *Nickols v. Giles*, 2 Root, 461; *The State v. Paine*, 2 Humph. 523; *United States v. Green*, 3 Mason, 482.

² *Faulk v. Faulk*, 23 Texas, 653; *Young v. The State*, 15 Ind. 480.

³ *Ante*, § 543.

ill conduct of the husband or the wife may be shown in so far as it operates to prove the fitness or want of fitness in this person to have the charge of the children.¹

§ 549. It may be well to enumerate a few considerations which the court sometimes takes into the account in determining the custody; they are, the wishes of the children;² the health and ages of the children, and the fitness of the respective parents to have, as to these matters, the charge of them;³ an agreement of the parties, whether they be the respective parents as between themselves, or a parent on the one side and a stranger on the other side, respecting the custody, and whether the agreement be valid in law, or, as an agreement, of no legal efficacy.⁴ Other considerations will appear in earlier parts of this chapter.

§ 550. The father of a bastard child has no right, as father, to its custody; the parental right, in this case, is with the mother.⁵ So, where the father of a legitimate child dies, the mother may, to a certain extent, and in preference to third persons, claim the custody.⁶

§ 551. Some questions there are, connected with the proceedings, as concerns the matter discussed in the present sub-

¹ *De Manneville v. De Manneville*, 10 Ves. 52; *People v. Olmstead*, 27 Barb. 9; *People v. Humphreys*, 24 Barb. 521; *Ex parte Schumpert*, 6 Rich. 344; *The State v. Stigall*, 2 Zab. 286; *Reg. v. Baxter*, 2 U. C. Q. B. 370.

² *Commonwealth v. Hammond*, 10 Pick. 274; *Commonwealth v. Hamilton*, 6 Mass. 273; *People v. Pillow*, 1 Sandf. 672; *The State v. Stigall*, 2 Zab. 286; *People v. Porter*, 1 Duer, 709; *People v. Chegaray*, 18 Wend. 637; *The State v. Scott*, 10 Fost. N. H. 274.

³ *Mercein v. People*, 25 Wend. 64.

⁴ *Curtis v. Curtis*, 5 Gray, 535; *Faulk v. Faulk*, 23 Texas, 653; *Young v. The State*, 15 Ind. 480; *Farnsworth v. Richardson*, 35 Maine, 267; *Richardson v. Richardson*, 32 Maine, 560; *Commonwealth v. Hammond*, 10 Pick. 274; *Commonwealth v. Hamilton*, 6 Mass. 273; *Hutson v. Townsend*, 6 Rich. Eq. 249; *Mayne v. Baldwin*, 1 Halst. Ch. 454; *People v. Mercsin*, 3 Hill, N. Y. 399; *The State v. Clover*, 1 Harrison, 419.

⁵ *Robalina v. Armstrong*, 15 Barb. 247.

⁶ *Ante*, § 527; *People v. Wilcox*, 22 Barb. 178.

title; but, with a reference to a few cases in a note,¹ it is deemed best the discussion should end here.

III. *The Support of the Children under Decree of Court.*

§ 552 [640]. Generally the same statute which authorizes the court to assign, at its discretion, the care of the children to the mother, confers on it also the power to compel the father to furnish her with a fund for their support. And when they are thus committed to an injured wife, they are usually, if the husband is of sufficient ability, not to be left pecuniarily burdensome to her. The doctrine appears to be, that such an allowance will be made out of his estate as will fully maintain them, in a manner corresponding with his condition in life.²

§ 553. The books do not contain such numbers of adjudications, or such discussions of principles, as will enable the author to expand this topic further. We have already seen,³ that, in these cases, the decree of the court should distinguish between the sums paid to the wife for her own support, and those paid to her for the support of the children intrusted to her care. At the same time it is believed, that many American decrees may be found in which this matter has been neglected, and the whole of the allowance appears in the form of alimony to the wife. In a New Hampshire case, the decree was so; and, subsequently thereto, the divorced parties were again married; then a petition was

¹ *The State v. Brearly*, 2 Southard, 555; *Mercein v. People*, 25 Wend. 64; *People v. Kling*, 6 Barb. 366; *The State v. Cheeseman*, 2 Southard, 445; *Lindsey v. Lindsey*, 14 Ga. 657; *People v. Chegarey*, 18 Wend. 637; *People v. Porter*, 1 Duer, 709.

² *Richmond v. Richmond*, 1 Green Ch. 90. And see *Jeans v. Jeans*, 2 Harring. Del. 142; *Barrere v. Barrere*, 4 Johns. Ch. 187, 197; *Williams v. Williams*, 4 Des. 183; *Anonymous*, 4 Des. 94; *Bedell v. Bedell*, 1 Johns. Ch. 604.

³ Ante, § 466; *Foots v. Foots*, 22 Ill. 425; *Whieldon v. Whieldon*, 2 Swab. & T. 388; *Richmond v. Richmond*, 1 Green Ch. 90.

filed in behalf of the children, praying that a portion of the property assigned as alimony should be placed in the hands of a trustee for their support. The court denied the prayer, Bell, J., observing: "It is said, that this property was asked for by the wife, and decreed to her by the court, in part for the support and maintenance of the minor children of the parties. In a qualified sense, this statement may be correct. The wife may have asked more alimony, on account of the condition of her family depending upon her, and the court may have made her a more liberal allowance upon that account; but it cannot be true that the court have awarded to the wife any property upon any implied trust for her children."¹

§ 554. In a New Jersey case, the Chancellor made the following observations: "From the evidence now before the court, I incline to the opinion, that, if the daughter continues in health, the allowance for her support should cease when she attains the age of eighteen. I will hear an application on this ground from the father at the proper time. No bill is necessary for that purpose. The application may be made by petition."²

§ 555 [644]. If we look at this question of the support of children, on a decree of divorce, in the light of principle, we shall be led to the following views: when the court pronounces for a divorce pursuant to the prayer of the wife, and gives her the custody of the children; then, in respect to their support, the rule would apply to the husband, that no man shall profit by his own wrong, and, to the wife, the corresponding rule, recognized by good sense, if not so formally received as the other among the maxims of the legal family, that no one shall suffer for doing right; in pursuance of which, the husband should be charged with the full burden

¹ Dow v. Dow, 38 N. H. 188, 190.

² Snover v. Snover, 2 Beasley, 261, 263.

of maintaining the children committed to the wife's care. Yet if he were a poor man, and so the children would be obliged to labor in part for their support were the cohabitation continuing, this fact should be taken into the consideration; indeed he should take care of and educate his children, according to his ability and standing, as shown in those principles which relate to alimony, already brought under our review. At the same time, a wealthy father should never be compelled by a court to do what many wealthy fathers do voluntarily, lavish on the child money and the luxuries which money brings, till the promptings of its nature to do and to suffer, as every human being should do and suffer in this life if he would discharge to himself the duties which the Creator intended when placing man on the earth, are eaten out by the rust of inactivity, and vice takes possession where virtue should dwell.

§ 556 [639]. The mere giving to the wife of the custody of the children, at least the mere appointment of her to be guardian over them, by a legislative act which dissolves, on her petition, the marriage, does not change the legal relation of the father to them, further than concerns the right of guardianship. It does not emancipate them; and their settlement in law follows his, not the mother's, with whom they are living; and he is relieved from no obligation to support them.¹ Thus it was held in Connecticut; and further, that, where the parents were divorced by legislative act, and the mother was appointed guardian of the minor children, the father was liable in a suit at common law to compensate her, and a stranger whom she had married, for the education and support furnished them.² But the New York Supreme Court refused to recognize this doctrine to its full extent;

¹ *Marlborough v. Hebron*, 2 Conn. 20; *Stanton v. Willson*, 3 Day 37; *Leavitt v. Leavitt*, Wright, 719; *Cowls v. Cowls*, 3 Gilman, 435.

² *Stanton v. Willson*, 3 Day, 37. And see the observations of the court, upon this case, in *Gordon v. Potter*, 17 Vt. 348.

and Platt, J., who gave the opinion, observed: "The obligation to support the children of that marriage was equal upon both the parents; there being no special contract between the parties, nor any provision upon that subject in the statute granting the divorce. The only provision regarding the children (and that was made upon the express application and request of [the mother] Mrs. Bird), was, that the father should be divested of the custody and control of them, and that the mother should be their sole guardian. The mother being under equal natural obligation with the father to maintain her offspring, and no positive law of Connecticut being shown on that subject, I can see no legal ground to authorize a recovery by the mother against the father for the maintenance of the children. At most, she can have a right to sue for a contribution only."¹

§ 557 [639]. In a more recent Connecticut case, where there had been a judicial divorce on the application of the wife, to whom the custody and control of the minor children were awarded, the majority of the court, two judges dissenting, refused to sustain her action of book debt, against the father, for the cost of maintaining and educating them. The ground of the refusal was, that, after the divorce, the parents were under equal obligation for their support; so that she, at the utmost, could demand no more than a contribution from the father.² The true legal principle applicable to cases of this kind seems to be, that the right to the services of the children, and the obligation to maintain them go together;³ and, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation. So where the court, granting the divorce and assigning the custody to the wife, makes, under authority of the statute, provision for their sup-

¹ *Pawling v. Willson*, 13 Johns. 192, 209.

² *Finch v. Finch*, 22 Conn. 411. ³ See ante, § 528, and the cases there cited.

port out of the husband's estate,¹ he would seem, within principles already mentioned,² to be relieved from all further obligation.

§ 558. There are some cases, principally of a more recent date than those referred to in the last two sections, from which some further views relating to this matter may be derived. In Pennsylvania, a mother deserted her husband before the birth of her child, for which desertion the husband obtained a divorce; but there was no decree of the court relating to the custody of this child. She retained the child, after the divorce, in her own keeping, and brought suit to recover of the father compensation for its maintenance. The court held, that she was not entitled to recover; and Lowrie, C. J., observed: "The father is willing to take the child and support it himself. If she prefers to keep it, she can claim nothing from him as a right; and we cannot enforce the duty of generosity. When a man abandons his child and casts it upon the public, he becomes liable for its support. But it is entirely impossible to treat a child as thus cast on the public, when the fact simply is, that the mother has deserted the father, and carried away the child, and continues to support it."³ On the other hand it has been held,—no question of divorce being involved,—that the obligation of a father to provide for his child is not affected by his wife's misconduct; and if, notwithstanding such misconduct, he suffers the child to live with the wife, he thereby constitutes her his agent to contract for necessities for the child, and is liable to those who furnish them thus on his credit.⁴ The doctrine of these cases, in which different results were reached, is perhaps not inharmonious; still it seems to the writer that the true principle is this: if, as a matter of fact, of which a jury is to judge, the father meant to intrust the mother with an agency

¹ Ante, § 552.

² Ante, § 401.

³ *Fidler v. Fidler*, 9 Casey, 50, 57.

⁴ *Gill v. Read*, 5 B. L. 343; *Bumney v. Keyes*, 7 N. H. 571.

in these cases, he is holden on this ground ; or, if he meant to pay her, or perhaps if he meant to cast off the children without giving them any support, he is holden. Yet if she chose to take the children herself, and provide for them, while the father was willing to provide for them himself, the fact of his not interfering to prevent her executing this choice could not place him under any legal obligation to her or any other person. They had necessities furnished by one who was willing to furnish them, while he was willing to do the same thing also.¹

§ 559 [645]. We have thus considered the usual orders and decrees which accompany and follow the sentence of divorce ; but the statutes of some of the States contain other provisions still. For example, the court in New York, on granting a divorce, may decide upon the legitimacy of children born subsequently to the commission of the offence for which the divorce is given.² But we shall find little satisfaction in pursuing these investigations further ; since the books do not furnish us with adjudications to point the way.

¹ And see *Hancock v. Merrick*, 10 Cush. 41 ; *Burritt v. Burritt*, 29 Barb. 124.

² *Cross v. Cross*, 3 Paige, 189 ; *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375 ; *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

BOOK VI.

THE PROCEDURE IN SPECIFIC CAUSES OF DIVORCE AND NULLITY; EMBRACING PLEADING, PRACTICE, AND EVIDENCE.

CHAPTER XXXII.

GENERAL VIEWS.

§ 560. THE present book does not embrace quite all the causes of divorce and nullity which were mentioned in the first volume; because not all of them require any specific explanation with regard to the procedure. In previous portions of this second volume, we have so far examined the general doctrines which concern the pleading, practice, and evidence in these causes, as will leave but an easy course for us through the following chapters.

§ 561. In the closing part of this volume, a sufficient number of forms will be given fully to illustrate the practice and the pleading. Let us, in the chapters now before us, endeavor to supply matter of reference whereby those forms can be verified; and furnish, likewise, the needful view of the evidence.

CHAPTER XXXIII.

WANT OF MENTAL CAPACITY.¹

§ 562. THE reports do not contain any cases relating to the pleading and practice to be pursued where a marriage is sought to be set aside on the ground of the insanity of one of the parties; and it is not deemed best to enter into mere speculation upon the subject, especially as no questions of much difficulty are liable to arise in relation to this matter. Some questions concerning the evidence there are, however, for consideration.

§ 563 [184]. The first question relates to the burden of proof. The full and complete discussion of this question would lead us further into the general law of evidence, than it would be consistent with the object of these pages for us to go. The proposition however has been laid down, that, when the fact of marriage between parties of sufficient age is established, the law presumes them to have been capable of giving a valid consent; and he who alleges the contrary must prove it.² And this is a part of the general doctrine, that every person is to be presumed, *prima facie*, to be sane.³ On the other hand, the doctrine is stated to be, that, when a condition of permanent insanity is once shown, the burden shifts, and he who claims there was a lucid interval must

¹ For the law relative to this ground of nullity, see Vol. I. § 124 et seq.

² *Browning v. Reane*, 2 Phillim. 69, 1 Eng. Ec. 190; *Wheeler v. Alderson*, 3 Hag. Ec. 574, 598, 5 Eng. Ec. 211, 223; Hale P. C. 33; *Leggitt v. O'Brien*, Milward, 325, 334; *Powell v. Powell*, 27 Missis. 783. See *Chambers v. The Queen's Proctor*, 2 Curt. Ec. 415, 7 Eng. Ec. 151; 1 Fras. Dom. Rel. 45.

³ *Archey v. Stephens*, 8 Ind. 411.

prove it.¹ Yet if the insanity is temporary, depending on some exciting cause not in perpetual action, the rule is said to be different; and the burden still remains with him who alleges the insanity, to show that it, or its cause, was in operation at the very time of the marriage.² And this distinction probably explains why Sir George Lee, in *Parker v. Parker*, refused to pronounce against the marriage;³ a result different from what was arrived at in the Scotch case of *Brown v. Johnston*, where the woman was shown to be in the habit of getting drunk, insanity always accompanying her intoxication, and continuing for a time after the drunken fit was over, and she was proved to have been intoxicated before and at the time of the marriage.⁴

§ 564 [185]. When the insanity of a party has been estab-

¹ *Turner v. Meyers*, 1 Hag. Con. 414, 4 Eng. Ec. 440, 442; *Terry v. Buffington*, 11 Ga. 337. See *Groom v. Thomas*, 2 Hag. Ec. 433, 4 Eng. Ec. 181; *Cartwright v. Cartwright*, 1 Phillim. 90, 1 Eng. Ec. 47; *Grimani v. Draper*, 12 Jur. 925; *White v. Driver*, 1 Phillim. 84, 1 Eng. Ec. 44; *Archev v. Stephens*, *supra*; *Wray v. Wray*, 33 Ala. 187; *Kemble v. Church*, 3 Hag. Ec. 273, 5 Eng. Ec. 107, where the long interval of seventeen years since the insanity proved was held to be a material circumstance. And see on this point *Arbery v. Ashe*, 1 Hag. Ec. 214, 3 Eng. Ec. 89; *Brogden v. Brown*, 2 Add. Ec. 441, 2 Eng. Ec. 367; 1 Greenl. Ev. § 42.

² *Legeyt v. O'Brien*, Milward, 325, 334, 335. See also *White v. Wilson*, 13 Ves. 87; *Hall v. Warren*, 9 Ves. 605, 611; *Ayrey v. Hill*, 2 Add. Ec. 206, 209, 2 Eng. Ec. 269, 271; *Wheeler v. Alderson*, 3 Hag. Ec. 574, 5 Eng. Ec. 211; *Brogden v. Brown*, 2 Add. Ec. 441, 2 Eng. Ec. 367; *Stewart v. Redditt*, 3 Md. 67; *Corbit v. Smith*, 7 Iowa, 60.

³ *Parker v. Parker*, 2 Lee, 383, 6 Eng. Ec. 165.

⁴ *Brown v. Johnston*, Ferg. Consist. Law, Rep. 229. "It is established by every witness who knew Miss Brown, that, after a fit of intoxication, which generally lasted for many days at a time, she was not in a state of mind to judge of any thing serious for several days after she got out of it; and, when it is considered that her liquor was ardent spirits, every person must be convinced of the truth of that evidence. As therefore the complainer, who knew this as well as any other person, went off with Miss Brown while she was in a state of inebriety, in which she had been for nine immediately preceding days, it was his duty to prove, that, during the course of the week, from Monday to Saturday [the marriage was on Monday evening, and on Saturday she left the pretended husband, and refused to have any further communication with him], she had been in the state of sane recollection, and acknowledged him as her husband." The Lord Ordinary's note of the case, p. 251. See also *Browning v. Reane*, *supra*.

lished, no sufficient proof of a lucid interval arises from the mere fact that he went through the marriage ceremony with propriety and decorum. "The mere joining of hands," remarks Dr. Ray,¹ "and uttering the usual responses, are things not worth considering; it is the new relations which the marriage state creates, the new responsibilities which it imposes, that should fix our attention as the only points in regard to which the question of capacity can be properly agitated. In other contracts, all the conditions and circumstances may be definite and brought into view at once, and the capacity of the mind to comprehend them determined with comparative facility. In the contract of marriage, on the contrary, there is nothing definite or certain; the obligations which it imposes do not admit of being measured and discussed; they are of an abstract kind, and constantly varying with every new scene and condition of life. With these views, we are obliged to dissent from the principle laid down by the Supreme Judicial Court of Massachusetts, in a case of libel for divorce for insanity of the wife at the time of the marriage, that the fact of the parties being able to go through the marriage ceremony with propriety, was *prima facie* evidence of sufficient understanding to make the contract.² If by making the contract is meant merely the giving of consent, and the execution of certain forms, then indeed the fact of the party's going through the ceremony with propriety may be some evidence of sufficient understanding to make it; but, if the expression includes the slightest idea of the nature of the relations and duties that follow, or even of the bonds and settlements that sometimes accompany it, then the fact here mentioned is no evidence at all of sufficient capacity. Sir John Nicholl, looking at the subject in a different light, has very properly said, 'going through the ceremony

¹ Ray Med. Jurisp. Insan. 2d ed. § 200.

² Anonymous, 4 Pick. 32. This is a brief case, little considered by the court. The question of the burden of proof was not discussed in it; and it cannot be taken, in any view of it, as an authority for the proposition, that propriety of conduct during the marriage ceremony would be sufficient evidence in itself alone of a lucid interval, in persons shown to be habitually insane.

was not sufficient to establish the capacity of the party, and that foolish crazy persons might be instructed to go through the formality of the ceremony, though wholly incapable of understanding the marriage contract.'¹ In a similar case, Lord Stowell, then Sir William Scott, had previously observed, on the fact given in evidence that the party had 'manifested perfect propriety of behavior during the ceremony, that much stress was not to be laid on that circumstance, as persons in that state will nevertheless often pursue a favorite purpose with the composure and regularity of apparently sound minds.'"²

§ 565 [186]. If the insane person has recovered his reason, being of lawful age, any suit on his behalf to establish the nullity of the marriage must be brought in his own name.³ But though one is permitted thus to plead his own former incapacity, the burden of proof lies heavily on him.⁴

§ 566 [186]. In cases where, subsequently to the marriage, a commission of lunacy has been taken out, and the jury has found, that the party was insane at the period of marriage solemnized, this finding is admissible in evidence as tending to establish its nullity;⁵ and we have seen, that in England the marriage would be conclusively null, if the commission were taken out before.⁶ The doctrine, in respect to a commission taken out after the solemnization, and the jury covering in their finding the former period, as deducible from other causes than matrimonial, appears to be, that the verdict is sufficient *prima facie* evidence of insanity, but it

¹ *Browning v. Reane*, 2 Phillim. 69, 1 Eng. Ec. 190, 197.

² *Turner v. Meyers*, 1 Hag. Con. 414, 4 Eng. Ec. 440, 444. See also *Parker v. Parker*, 2 Lee, 382, 6 Eng. Ec. 165.

³ *Wightman v. Wightman*, 4 Johns. Ch. 343; *Turner v. Meyers*, 1 Hag. Con. 414, 4 Eng. Ec. 440.

⁴ *Turner v. Meyers*, *supra*.

⁵ *Portsmouth v. Portsmouth*, 1 Hag. Ec. 355, 3 Eng. Ec. 154. And see *Ex parte Glen*, 4 Des. 546.

⁶ Vol. I. § 130.

may be rebutted.¹ In a matrimonial cause, Sir John Nicholl seemed inclining to give it certainly no greater weight than this, if so great; for he said: "The finding is a circumstance, and a part of the evidence, in support of the unsoundness of mind at the time of the marriage, but no more; for this court must be satisfied by evidence of its own, that grounds of nullity existed." And in the case in which these observations occur, the plaintiff did not in fact rely upon this evidence alone.²

§ 567. Some adjudged points relating to this matter are the following: In 1836, a man was found, by an inquisition of lunacy which he never traversed, to be of unsound mind. In 1838, he was married in due form; and, in 1850, he died, leaving of the marriage issue who claimed to be his heirs at law and distributees. It was held, that the inquisition of lunacy was only *prima facie* evidence of his mental incapacity to contract the marriage, and that the issue had the right to litigate this question. This was a South Carolina case, and Dunkin, Ch., observed: "In reference to proceedings in lunacy, our courts adopt the practice of Westminster Hall, as it existed prior to 1721, so far as is consistent with our institutions. In this view, the Stat. 2 Edw. 6, giving the right of traverse, has been held applicable, although not expressly declared to be of force in this State by any legislative enactment."³

§ 568. In a North Carolina case, on a suit brought by the committee of an idiot to have a marriage which, like the one mentioned in the last section, was entered into subsequently to the finding of the commission, declared void, it was laid down by the court that the commission was not conclusive evidence of the idiocy; and a query was even suggested, whether it was so much as *prima facie* evidence;

¹ *Sergeon v. Sealey*, 2 Atk. 412; *Yates v. Boen*, 2 Stra. 1104; *Faulder v. Silk*, 3 Camp. 126; *Baxter v. Portsmouth*, 5 B. & C. 170; 2 Greenl. Ev. § 371.

² *Portsmouth v. Portsmouth*, *supra*. ³ *Keys v. Norris*, 6 Rich. Eq. 388, 390.

though, under all the facts appearing, a sentence of nullity was pronounced.¹ In a Kentucky case,—not, however, a suit for divorce or nullity,—the doctrine was laid down, that an inquest of lunacy is conclusive evidence *eo tempore*, but only *prima facie* such as to any subsequent time.² And it seems to be the general doctrine with us, that, when one under guardianship as insane does an act, his insanity shall be so far presumed as to cast upon the person affirming the contrary the burden of proving the sanity; though some of the cases appear to make the fact of guardianship only an item of evidence toward establishing the insanity, which the party alleging its existence must take the burden throughout of proving.³

§ 569. The effect of a guardianship over an alleged insane person may, however, under the statutes of some of our States, be such as to disqualify the person to do an act of a particular kind, though the act were performed during a lucid interval; and such effect the reader will distinguish from the matter of proof now under discussion. Thus, in Pennsylvania, one found by inquisition to be a habitual drunkard is thereby rendered incompetent to enter into any subsequent contract which will bind his estate; but, if he has the requisite mental capacity, his marriage may nevertheless be good. And where such a person executed just before his marriage a bond for the benefit of his intended wife, the bond was held to be void, though the marriage was valid. Said Thompson, J.: "There is nothing in the argument, that, the bond being in the nature of an ante-nuptial settlement, it must be sustained, or the marriage contract itself will necessarily be void. The incapacity to contract regards only the estate. Contracts, purely personal, or for others, and not involving the estate, may not be void. It was held, in

¹ Johnson v. Kincade, 2 Ire. Eq. 470.

² Clark v. Trill, 1 Met. Ky. 35; s. p. Lucas v. Parsons, 23 Ga. 267.

³ Rogers v. Walker, 6 Barr, 371; Stone v. Damon, 12 Mass. 488; Hopson v. Boyd, 6 B. Monr. 296; Lucas v. Parsons, supra; Field v. Lucas, 21 Ga. 447; Thomasson v. Kercheval, 10 Humph. 322.

Sill v. McKnight,¹ that one decreed a habitual drunkard might legally be an executor. The marriage, in this case, was not invalidated by reason of the status of Witmer [the husband], at the time of its celebration."²

¹ *Sill v. McKnight*, 7 Watts, & S. 244.

² *Imhoff v. Witmer*, 7 Casey, 243, 245. And see *Wadsworth v. Sharpsteen*, 4 Seld. 388. •

CHAPTER XXXIV.

FRAUD.¹

§ 570. WE have already had occasion to see,² that, in the United States, according to the doctrine more generally prevailing, a court of equity, having general equity powers, will take jurisdiction to declare a marriage void by reason of fraud, even though there is no specific statute on the subject.³ But in most of our States, this matter is not left in so general a way, there are specific statutes authorizing some tribunal to grant the sentence of nullity for this cause.

§ 571. Concerning the form of the bill or libel, there is not much which can be said, based upon specific authority. In a Pennsylvania case, the statute providing, that the complainant shall exhibit his complaint "setting forth particularly and specially" the grounds thereof, the following allegation was held not to be sufficient: "That the said Amanda Gœbel [the defendant] hath wilfully and maliciously obtained the said marriage fraudulently, and with force and coercion; and that in order to obtain the said marriage, the said Amanda wilfully and knowingly made false representations to your libellant and his friends, which said false representations (your libellant at the time not knowing them to be false) induced the said libellant to enter into the bonds of matrimony with the said Amanda Gœbel." It was observed by Thompson, J., that "neither the nature of the force employed, nor the kind of fraud practised, or in what consisted the false representations, is disclosed or hinted at in

¹ For the law relating to this ground of nullity, see Vol. I. § 164 et seq.

² Ante, 291-293.

³ And see *Fowler v. McCartney*, 27 Missis. 509.

the libel." Moreover, the defect was not "attempted to be cured by serving and filing a specification of the facts intended to be proved, which, under the authority of *Steele v. Steele*,¹ might perhaps still be permitted by the courts."²

§ 572. The general doctrine applicable to all cases in which fraud is alleged, whether they be divorce cases or any other, is, that he who alleges the fraud takes upon himself emphatically the burden of proving it; since fraud, being a dereliction of duty, is not to be presumed.³ Still, the evidence of fraud need not be such as absolutely to resist every other conclusion;⁴ and Black, C. J., in a Pennsylvania case, once observed: "It is not true that fraud can *never* be presumed;" for allegations of fraud are generally sustainable, and in fact sustained, only by circumstantial evidence.⁵ Therefore in questions of fraud, there should be allowed to the party relying on this allegation considerable latitude in the production of his evidence, the court excluding nothing which is not plainly irrelevant.⁶ Such are some of the points found in cases not matrimonial, and they apply equally where the cause relates to the nullity of the marriage.

§ 573. Where, in a suit by the husband to annul the marriage by reason of his consent to it having been obtained by fraud, the fraud attempted to be shown consisted in a conspiracy between the woman and her paramour to conceal from the plaintiff the fact of her being with child by the paramour, yet the paramour was not a party to the bill, — it was held, in the New York Chancery Court, that the admission, by this third person, of the fact of his being the child's father, was not evidence to rebut the legal presumption of paternity in the husband.⁷

¹ *Steele v. Steele*, 1 Dall. 409.

² *Hoffman v. Hoffman*, 6 Casey, 417, 419.

³ *Joyce v. Joyce*, 5 Cal. 161; *Coulson v. Coulson*, 5 Wis. 79; *Flint v. Jones*, 5 Wis. 424; *Stewart v. English*, 6 Ind. 176; *Hollister v. Loud*, 2 Mich. 309.

⁴ *Seligman v. Kalkman*, 8 Cal. 207; *Parkhurst v. McGraw*, 24 Missis. 134.

⁵ *Kaine v. Weigley*, 10 Harris, Pa. 179.

⁶ *Gist v. McJunkin*, 2 Rich. 154.

⁷ *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

CHAPTER XXXV.

IMPOTENCE.¹

§ 574. A SUIT for nullity on the ground of impotence is a proceeding delicate in its nature, and requiring special care in respect both to the allegations and the proofs. The practitioner who appears for the plaintiff must set out a sufficient cause on which to base the sentence he prays, and must produce sufficient evidence to sustain the averment; at the same time, he should be careful not needlessly to offend that sense of modesty and decency which should be respected as well in courts of justice as in other places.² Yet no false modesty should prevent him from setting forth in due legal form the ground of complaint, and sustaining it by competent and sufficient evidence.

§ 575. In a Connecticut case, "the petitioner stated," says the report, "that, on the 26th of February, 1828, she [the petitioner] was lawfully married to the respondent; that she was induced to enter into such marriage from the false and fraudulent representations of the respondent, from which she was made to believe, that he was a sound man, and wholly competent to the performance of all the duties of a husband; yet that, at the time of said intermarriage, the respondent was, and ever since has been and still is, laboring under a corporal imbecility, and never has had or attempted to have sexual intercourse with the petitioner, although they have, for several weeks, lodged together in the same bed." A sen-

¹ For the law relating to this ground of nullity of marriage, see Vol. I. § 321 et seq.

² And see ante, § 287.

tence of nullity having been on this petition granted, it was reversed on writ of error because the petition did not set forth a sufficient ground whereon to found the sentence. The court considered, that the allegation of fraud could have no influence, because it is not stated what the particular fraudulent representations were; neither could the allegation of the want of sexual intercourse avail, this being a mere statement of the evidence, and there being no allegation of the cause by reason of which there was no such intercourse; and the allegation, "that," to quote the exact words, "at the time of their intermarriage the said Abel was, and ever since has been, and now is, laboring under a corporal imbecility," could not suffice, because it contains no intimation of its permanence or incurability. "I would not intimate," said Bissell, J., "that the record need contain grossly indelicate statements. But surely enough should be stated to enable the court to see that the case demands their interference. This, in my opinion, is not done in the present case."¹

§ 576. In Coote's Ecclesiastical Practice, there are given the forms of two libels for nullity on the ground of impotence. The first one sets out; in several successive articles, the living together of the parties in the general way of husband and wife, and alleges specific times when they "lay naked and alone together in one and the same bed." It likewise states, that the parties were respectively in good health, and that "she the said C. D. [the complainant] was also apt and fit for coition and the procreation of children, and was willing to receive and showed herself desirous of receiving the conjugal embraces of the said A. B. [the defendant], and on all occasions gave herself up to him for the purpose." Then it proceeds as follows: "That notwithstanding the premises pleaded in the next preceding articles, the said A. B. has not at any time been able to consummate the said marriage, and she the said C. D. never hath been carnally known by him,

¹ Ferris v. Ferris, 8 Conn. 166.

nor is he the said A. B. able carnally to know her the said C. D.; and the party proponent doth expressly allege and propound, that the inability of the said A. B. to consummate the said marriage and carnally know the said C. D., arises from the defective state of the parts of generation of him the said A. B., and his natural impotency, imbecility, and impediment, which renders him incapable of consummating marriage, or of carnally knowing or having sexual intercourse with any woman whomsoever." Another article is as follows: "That prior to and at the time of the said marriage on the &c., and at all times subsequent thereto, the said A. B. was, as he now is, impotent, and wholly incapable of performing the act of generation or of carnally knowing any woman, and such his constant impotency, or imbecility, and incapacity, will clearly appear on an inspection of his person by physicians and surgeons or other competent persons sufficiently skilled to form an opinion respecting the same; and it will also appear by such inspection that such the constant impotency, inability, and incapacity on the part of the said A. B. cannot be removed or relieved."¹

§ 577. The other libel is also that of the woman against the man, and the two articles material to our practice are as follows: "Thirteenth. That during all and singular the nights and parts of nights that the said A. B. and the said C. D. otherwise, &c., lay, naked and alone, in one and the same bedroom and bed, as pleaded in the sixth, seventh, eighth, ninth, and eleventh articles of this libel, the said [plaintiff woman] C. D. otherwise, &c., was apt and fit for coition, and was desirous of the conjugal embraces of him the said A. B., and willing to be carnally known, in order to become a mother, by him, and gave herself up to him, without any reserve, for that purpose accordingly; also that during the whole thereof, save as hereinafter excepted, the said A. B. was of sound and perfect bodily health, but that, notwithstanding the premises, the said A. B. neither ever did nor was ever able to consum-

¹ Coote Ec. Pract. 370-376.

mate his aforesaid pretended marriage with the said C. D., otherwise, &c., who is still a virgin, and has never been carnally known by man, as will appear on due inspection of her person (if necessary), to competent judges (physicians and surgeons, or others).” “Fourteenth. That the said A. B.’s parts of generation and sexual or seminal organs were and are not such, or in the same state, as are the same parts and organs in men capable of having connection with and of the carnal knowledge of woman; and the party proponent expressly alleges and propounds, that it will appear to competent judges (physicians and surgeons or others), on a due examination of his the said A. B.’s person, that such was and is the fact, and that he, the said A. B., as well at the time of his aforesaid pretended marriage with the said C. D., otherwise, &c., as before and ever since the same, hath been and now is naturally impotent or incapable of knowing any woman carnally; and that it will also further appear to such competent judges, on such due examination, that the said A. B.’s natural impotency aforesaid was and is irremediable, and not to be removed or relieved by art.”¹

§ 578. The English libel says nothing of fraud in the procurement of this marriage; and it is believed that nowhere, in this country, is there necessity or even propriety in alleging, in a libel for divorce for impotence, that the marriage was brought about by fraudulent practices. The form of the allegation, likewise, need not be so extended as it used to be in England under the ecclesiastical practice.² Perhaps the following may be accepted as containing the substance of what has been extracted from Coote’s Practice into the last two sections: That the libellant and respondent lay naked and alone together in one and the same bed during each night from the &c. to the &c.; that she, the libellant, was in good health, and apt and fit to receive the embraces of man, and to be carnally known by the respondent, and was willing and gave herself to be so known, but that he, being of good health,

¹ Coote Ec. Pract. 385, 386.

² See ante, § 217, 221, 281, 324.

was unable to consummate his said marriage; and she, the libellant, alleges, that she remains and is a virgin unknown, and that by reason of imperfections and disease in the sexual organs of the respondent, he was, at the time of his said pretended marriage with the libellant, and still is, incapable of consummating said marriage, or carnally knowing woman, and that his said incapacity is irremediable and incurable.

§ 579. A form of allegation like the one given in the last section seems adapted, if to it the period of cohabitation be specifically added, to those cases in which the proof of impotence consists, not so much in showing an obvious imperfection in the parts, as in showing a triennial cohabitation and non-consummation. When the defect is obvious on inspection, and especially when the complainant was, for instance, a widow at the time of marriage, and is not a virgin, the form of the allegation should be varied to accord with the particular facts.¹ In the proper place in this volume some further forms will be given.

§ 580 [241]. Relating to this divorce suit for impotence, there are certain principles, mentioned already,² from which the doctrine seems to be derivable, that, if a man marries, knowing himself to be impotent, he cannot himself carry on a suit to have the marriage declared void on this ground, though the party deceived can, and so could he, if he were ignorant of his own infirmity; or if, being himself without physical impediment, he marries a woman whom he knows to be impotent, he cannot be heard afterward to complain of this. These propositions were substantially affirmed by Sir John Nicholl, in a suit by the husband, who was forty-five years old at the time of his marriage, to have it declared void after a cohabitation of seven years, because of his own impotence, from a cause obvious upon inspection. The husband had been moved to this suit by his wife's becoming pregnant. But the learned judge considered it incredible, that he should

¹ And see post, § 584, 585.

² Vol. I. § 323, 333.

have lived forty-five years in ignorance of this bodily defect in himself; at all events, he must have discovered it long before the institution of his suit; and so the maxim *Cur tamdiu tacuit?* would apply. On this aspect of the case, he rejected the libel.¹ Dr. Lushington has since remarked of this case: "I do not mean to say, that Sir John Nicholl was not perfectly justified in thinking his own reasons sufficient for refusing to entertain that suit; but, at the same time, I cannot honestly refrain from saying, that there were grounds, if not counterbalanced by others, which ought to have induced him to admit that libel."²

§ 581 [242]. In the before-mentioned case, the counsel for the husband relied on the text of the canon law, and on a manuscript opinion of the late Sir William Wynne. The latter opinion was to the effect, that "a woman may institute a suit of nullity of marriage against her husband on the account of impotence or incapacity *in herself* to perform the duties of marriage." Concerning this opinion, the court remarked: "That was the case of a woman. The opinion of any person of higher authority cannot be produced than of that person; but it cannot be considered as an authority applying to the case. The court does not mean to lay it down, that, in no possible case, or under no circumstances, a woman may be allowed to bring such a suit. But," continued the learned judge, referring to some canon-law authorities which had been produced, "even if the canon law is direct on the point, — is it according to the law of England to receive such a suit? It is a maxim, that no man shall take advantage of his own wrong; it is the principle of the canon law itself, the principle of reason and justice."³ The true distinction probably is, that a person cannot be heard to complain of a physical impediment in himself or the other party, of which he had knowledge at the time of the marriage; but, if he

¹ Norton v. Seton, 3 Phillim. 147, 1 Eng. Ec. 384. Vol. I. § 333; post, § 586.

² In Miles v. Chilton, 1 Robertson, 684, 699.

³ Norton v. Seton, 3 Phillim. 147, 1 Eng. Ec. 384.

were ignorant of the existence of the defect, or of its incurable nature, though in himself, he may take advantage of it by suit of nullity.¹ The marriage was a mistake; the ends intended by it cannot be answered. Either party may be heard for the correction of a mistake, though unaccompanied by fraud.² And on no principle can it make a difference, whether the man or the woman is plaintiff, only as a certain regard is in all matters of divorce paid to female delicacy;³ and she, therefore, is not held to so great promptness in instituting her suit as the man.

§ 582 [243]. The suit for impotence, like any other suit for nullity of marriage or divorce, may be affected by two ingredients of a very uncertain and undefined nature; namely, delay, and insincerity in the party proceeding.⁴ Perhaps the matter of insincerity is the one to be directly considered, and delay is to be viewed merely as proof of insincerity. And any unnecessary delay will be adverted to by the court as bearing on this matter of insincerity.⁵ Where, in a case of malformation, the husband was promoter, and the defect was palpable, a delay of seven years was said to be almost a bar.⁶ Delay by the husband of even sixteen months has occasioned suspicion;⁷ and it has been laid down that lapse of time, though it does not appear precisely what time, may operate as an absolute bar to the suit not brought by the party injured.⁸ But the wife is not held to the same promptness as the husband; the modesty of the sex may account for forbearance by her;⁹ and, where the woman commenced proceedings twelve years after the marriage, relying, however,

¹ See Ayl. Parer. 230.

² 1 Story Eq. Jurisp. § 142-144.

³ Post, § 582.

⁴ Ante, § 103 et seq., and especially § 112.

⁵ *Briggs v. Morgan*, 2 Hag. Con. 324, 330; s. c. 3 Phillim. 325, 1 Eng. Ec. 408; *Anonymous*, Deane and Swabey, 295.

⁶ *Guest v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548. And see *Harris v. Ball*, in *Norton v. Seton*, 3 Phillim. 147, 155, and remarks of Sir John Nicholl in the latter case, 1 Eng. Ec. 384, 385, 386.

⁷ *Briggs v. Morgan*, 3 Phillim. 325, 330, 1 Eng. Ec. 408, 410.

⁸ *Ball v. Ball*, cited in *Norton v. Seton*, 3 Phillim. 147, 159, 1 Eng. Ec. 384, 386. Sir John Nicholl, in *Norton v. Seton*, 3 Phillim. 147, 159, 1 Eng. Ec. 384, 386.

on proof of non-consummation after a triennial cohabitation, no objection was made on account of the delay.¹ These authorities show, that the same strictness, as to the time within which the injured party must disaffirm the marriage, does not apply here as in cases of fraud and duress.²

§ 583 [243 a]. Indeed, in a late English case, the husband was permitted to carry on his suit instituted seventeen years after the marriage. In his libel, he explained the delay; the wife objected to its admission, but was overruled by the Consistory Court, the Arches Court, and the Judicial Committee, severally; all holding, that delay alone is not an absolute legal bar to the proceeding.³ Yet when this case came on for final hearing, the divorce was refused, chiefly because the plaintiff had so long slumbered over his rights. "Their lordships," said Dr. Lushington, "are all of opinion, that long acquiescence, with knowledge or the means of procuring knowledge, would operate as a bar to the prosecution of such a suit; and more especially if the circumstances showed, that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons."⁴

¹ Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308; Rogers Ec. Law, 2d ed. 641. In a late case, where the wife's suit was brought twenty-one years after the separation, and twenty-five after the marriage, the majority of the court held, that, under all the circumstances of the particular case, the divorce should be refused. H. v. C. 1 Swab. & T. 605. See ante, § 111, 112.

² Vol. I. § 178, 214.

³ B. v. M. 2 Robertson, 580.

⁴ B——n v. B——n, 28 Eng. L. & Eq. 95, 101; s. c. in all its stages, 1 Spinks, 248. There is great confusion in the books concerning the precise limitations of the doctrines mentioned in this section and the last; and, in truth, they appear not to be of a nature susceptible of exact defining. Dr. Lushington, in a very late case, after mentioning the case spoken of in the text of this section as deciding, that the husband may be "barred by his delay or other conduct," adds: "But when the inquiry is pushed further, and it is asked, what is the delay and what is the conduct which shall bar the suit, I feel that all is involved in doubt and obscurity. If I consider the question of time, I do not find that any period has been fixed. If I look to other circumstances, I am still more in the dark; for I am not aware of any authority which has attempted to define them. I know nothing more painful than to have to exercise a judicial discretion, without landmarks to guide the judgment. If I look to the principle by which the institution of these suits is governed, it affords me little light to discover my way in such a combination of facts as now

§ 584 [241]. The age of the parties is always important to be considered in these suits, though there seems to be no age which absolutely bars the proceedings. A sentence of nullity, and especially an order to inspect the person, which, as matter of proof,¹ must generally precede the sentence, are granted less readily as the parties advance in years; and particularly is the court more reluctant to interfere, when, at the time of the marriage, the woman was past the period of child-bearing. While persons are young, this injury is greater; in more advanced life, it is less, and the mode of inquiry is less conclusive, and more abhorrent to the feelings. On these grounds, the libellant, in the English ecclesiastical practice,

presents itself. What is the principle, the foundation, of the right to claim a decree pronouncing a marriage void, where one of the parties is incapable of consummation? It is partly stated in the case already referred to [the one mentioned in our text]; and to that judgment I am justified in referring, for it is the judgment of all the Judicial Committee who heard the case: first, because the great chief purpose of marriage cannot be fulfilled; secondly, because, by such a marriage, the temptation to evil courses is not removed; thirdly [but see Vol. I. § 322 and note], because, in some cases, especially where the defect is on the husband's side, continued cohabitation would be destructive to the health and comfort of one of the parties. There was one such case a few years since, of a very distressing character. There are many other reasons which I need not recapitulate. . . . There are inherent difficulties in the subject-matter, which render the application of the principles laid down a very anxious task. Time is one. What combination of circumstances constitutes insincerity, another. . . . Except in case of extreme old age, it is obvious that the refusal to allow a remedy on account of the remissness of the husband, though he personally may not be entitled to complain, leaves untouched one reason for entertaining the suit, the prevention of illicit intercourse. Then, with regard to what is called in some preceding cases, and in *B. v. B.*, the insincerity of the suit, I have great difficulty in saying what would constitute insincerity, and what sincerity. Suppose a man anxious for issue, that motive would not constitute insincerity. Suppose a man anxious to marry another woman, I could not hold that to be insincerity. Suppose a man to indulge in illicit connections, could that be proof that he was insensible to the incapacity of his wife for conjugal intercourse? I do not think that proposition maintainable; it might rather bear the other way. Could such criminal connection alone bar the suit? No such argument has ever been advanced, and there is no precedent for so holding. Insincerity is therefore something different. I cannot attempt to define it; it must be a combination of circumstances which show, that the alleged grievance was not the motive which led to the commencement of the suit, but what would constitute such a case cannot be defined beforehand." Anonymous, *Deane & Swabey*, 295, 298-300. See also *H. v. C.* 1 Swab. & T. 605.

¹ Post, § 590.

must state in his libel the respective ages of the parties;¹ but whether this would be strictly necessary in this country is a point not discussed by the authorities; yet it is believed not to be necessary.

§ 585 [245]. The *proofs* of impotence are attended with some peculiarities. According to the facts of some cases, the defect is obvious; while, in other cases, either it or its incurable nature is ascertainable only by trial and time. Where therefore the allegation was, that the male member was soft and short, the court said, this did not always continue.² The books of Medical Jurisprudence furnish ample other illustrations. In these latter cases, the English rule, derived from the canon law, requires the parties to cohabit three years; and, if the marriage is not consummated within that time, impotence is presumed,³ — a rule, however, which has recently been somewhat relaxed as to time.⁴ But where the defect is obvious on inspection, this three years' cohabitation is unnecessary.⁵ And the libel must show on its face, either that there has been a triennial cohabitation, or that the defect is obvious upon inspection, — in which latter case also, some particular visible defect must be alleged, or the libel will not be admitted to proof.⁶

¹ *Briggs v. Morgan*, 2 Hag. Con. 328, 330; s. c. 3 Phillim. 325, 1 Eng. Ec. 408.

² *Grimbaldeston v. Anderson*, cited in *Norton v. Seton*, 1 Phillim. 147, 154, 1 Eng. Ec. 384, 385.

³ *Grimbaldeston v. Anderson*, *supra*; *Pollard v. Wybourn*, 1 Hag. Ec. 725, 3 Eng. Ec. 308; *Sparrow v. Harrison*, 3 Curt. Ec. 16, 27, 7 Eng. Ec. 359; *Welde v. Welde*, 2 Lee, 578. In *Pollard v. Wybourn* Dr. Lushington remarked: "Here are the very strongest grounds to presume the impotency of the man. If the parties lay together in one bed for so many years, of such ages, and the woman is certified to remain *virgo intacta*; there cannot be a stronger presumption, that impotency existed, and that it was incurable."

⁴ *Post*, § 588 et seq.

⁵ *Briggs v. Morgan*, 3 Phillim. 325, 1 Eng. Ec. 408; *Deane v. Aveling*, 1 Robertson, 279. "When the impotency doth sufficiently constare to be perpetual by the oaths aforesaid upon inspection, there the triennial probation ceases." Godol. Ab. 494.

⁶ *Aleson v. Aleson*, 2 Lee, 576; *Lewis v. Lewis*, cited 2 ib. 579.

§ 586 [246]. Moreover it is said in Swinburne on Spousals :
“ Albeit he that hath accomplished the age of fourteen years at the time of the marriage be not then *able to pay* the debt which he oweth to his wife, yet, by the received opinion (though some dissent), the matrimony is not therefore by and by to be adjudged void; but she is to expect until he have overreached the eighteenth year of his age, wherein *plena pubertas* is concluded; and, if then also he be unable to pay his dues, at the instance of the woman the marriage may be dissolved, unless the judge, upon the consideration of the qualities of the persons, shall grant a longer time.”¹

§ 587 [247]. In *Greenstreet v. Cumyns*, the cohabitation seems not to have continued for three years. The form of the allegation in this respect is not given in the report; but the marriage was celebrated in July, 1807, and the suit was instituted Nov. 1809. The libel, produced by the woman, charged the husband's incapacity for consummation; and he admitted the fact in his answers. The physicians and surgeons appointed to inspect his person stated substantially in their report, that, though the disease and imperfection of the parts were not such as to imply impotence to the execution of their functions; yet that, having heard his own accurate history of the alleged difficulty, they put full faith in his account; and, as he was in good health, they could hold out no hopes of its being remedied by any medical treatment. The wife seems not to have been inspected. Lord Stowell was of opinion, that the proofs were sufficient, and that there was no collusion, and pronounced for the nullity. “ There is an air of truth,” he said, “ in the evidence, and a great disposition on the part of the husband to atone for the injury he has inflicted on this lady; being in utter ignorance himself of his constitutional defects. It appears he was incapable at the time of the marriage, and has continued so ever since.”²

¹ Swinb. Spousals, 49.

² *Greenstreet v. Cumyns*, 2 Phillim. 10, 1 Eng. Ec. 165.

§ 588 [248]. In cases proper for the application of the three years' rule, a substantial compliance with it seems to be all which is required by the courts. There need not be a living together *de die in diem*, but a general cohabitation is sufficient.¹ The libel need not allege (we are now stating the practice in the English Ecclesiastical Courts) specially when, where, and how long in each place the parties cohabited; this being proper matter for plea on the other side.² But where the objection was taken, and it appeared, that, though the three years had elapsed, the parties had been necessarily separate a considerable portion of the time, the court allowed a further time, and enjoined the complainant to return meanwhile to cohabitation.³ On the other hand, in some late English cases, the divorce was granted on a period of cohabitation somewhat within the three years; and the court seemed evidently inclined to hold the rule, in respect to time, less strictly than some of the former decisions appear to maintain.⁴

§ 589 [249]. In no reported American decisions, has this rule of triennial cohabitation been considered. But since it is reasonable, is remedial also, reaching cases in which otherwise the proofs would fail, we may presume our tribunals will not reject it as being repugnant to our institutions and relations. A modification of it may, in some States, be required; as in New York, where a statute of limitations obliges the party, proceeding on the ground of impotence, to bring his suit within two years after the marriage.⁵ In the modern Scotch law, the substance of the rule is held; but "there is no precise, fixed period during which the parties must cohabit before a decree will be pronounced;" though anciently the time was three years, as in the canon law.⁶

¹ *Welde v. Welde*, 2 Lee, 578; *Sparrow v. Harrison*, 3 Curt. Ec. 16.

² *Welde v. Welde*, *supra*.

³ *Welde v. Welde*, 2 Lee, 580, 586.

⁴ *N. v. M.* 2 Robertson, 625; *s. c. nom. Anonymous*, 22 Eng. L. & Eq. 637; *s. c. nom. A. v. B.* 1 Spinks, 12; *U. v. F.* 2 Robertson, 614. And see post; § 600.

⁵ New York, R. S. pt. 2, c. 8, § 33.

⁶ 1 Fras. Dom. Rel. 59.

§ 590 [250]. There is also a peculiarity in the method of obtaining evidence, under some circumstances, in these cases. Since the plaintiff must establish both the impotence and its incurable nature, plainly under circumstances he can do it only by the aid of a medical and surgical examination, either of himself, or of the defendant, or of both. Therefore in England, Scotland, France, and probably every other country where this impediment to marriage has been acknowledged, the courts have compelled the parties, when necessary, to submit their persons to such an examination. In ancient times and in some countries methods of unnecessary exposure have been employed. But unless some way of compelling proofs were followed, there would be a failure of justice, which the law of no country should allow. "It has been said," remarks Lord Stowell, "that the modes resorted to for proof on these occasions are offensive to natural modesty. But nature has provided no other means; and we must be under the necessity of saying, that all relief is denied, or of applying the means within our power. The court must not sacrifice justice to notions of its own."¹ Something like this proceeding is known in the courts of the common law, in cases where a jury of matrons is called to ascertain, whether a woman, under sentence of death, is with child.²

§ 591 [251]. Unless this rule of inspection is repugnant to our institutions and positive laws, it must be deemed to have been imported into this country by our forefathers.³ Chancellor Walworth followed it, without a doubt of his right to do so. He well remarked: "When the legislature conferred this branch of its jurisdiction upon the Court of Chancery, it was not intended to adopt a different principle from that which had theretofore existed in England, and indeed in all Christian countries, as to the nature and extent of the physi-

¹ *Briggs v. Morgan*, 3 Phillim. 325, 1 Eng. Ec. 408, 410; 1 Fras. Dom. Rel. 60, 61; *Poynter, Mar. & Div.* 135, note.

² *Reg. v. Wycherly*, 8 Car. & P. 262; *The State v. Arden*, 1 Bay, 487, 489.

³ Vol. I. § 66 et seq.

cal incapacity which would deprive one of the parties of the power to contract matrimony. And the court is, by necessary implication, armed with all the usual powers, which, in that country from which our laws are principally derived, are deemed requisite to ascertain the fact of incapacity, and without which it would be impossible for any court to exercise such a jurisdiction.”¹

§ 592 [252]. In the same opinion he also says: “In every case of this kind, it is necessary that the court should proceed with the greatest vigilance and care, not only to prevent fraud and collusion by the parties, but also to guard against an honest mistake under which they may be acting merely from the want of proper medical advice and assistance. From the very nature of the case, it appears to be impossible to ascertain the fact of incurable impotence, especially when the husband is the complaining party, except by a proper surgical examination, by skilful and competent surgeons, in connection with other testimony. And if the allegations in the bill have neither been admitted nor denied by an answer on oath in the usual manner, the defendant should be examined on oath, before the master, as to the truth of those allegations. This appears to be the ordinary course of proceeding in such cases at Doctors’ Commons.² And I have no doubt as to the power of this court to compel the parties, in such a suit, to submit to a surgical examination, whenever it is necessary to ascertain the facts essential to the proper decision of the cause.”³

§ 593 [253]. The Ohio court has denied the right to compel an inspection; but under what circumstances, and influenced by what considerations, it does not appear. Whatever is known on the subject is embraced in the following, from the editor of the Western Law Journal. “I have

¹ *Devanbagh v. Devanbagh*, 5 Paige, 554, 556.

² *Poynter Mar. & Div.* 126, note.

³ *Devanbagh v. Devanbagh*, 5 Paige, 554, 557.

been," he says, "counsel in a case where the wife complained of impotence in the husband. There being no other mode of proof, application was made to the Supreme Court on the circuit for an order of inspection. The question was reserved to the court in bank, who decided that they had no power to grant the order, and the petition was dismissed on account of the impossibility of proof."¹

§ 594 [254]. The right of inspection, resting on necessity, ends, of course, where the necessity ends. Therefore, if, before suit brought, the party has been by physicians and surgeons inspected, nothing further will ordinarily be directed, only their testimony will be taken.² But where the answer of the defendant wife (the proceeding being in equity) admitted the present incapacity, and denied its having existed at the time of the marriage,—the difficulty being of a nature to render necessary a surgical examination of her person, *in connection with interrogatories* for her to answer under oath as to the commencement and progress of the disease creating it,—this procedure was ordered, although she had been previously examined *ex parte*, and *without oath*, by her own medical attendants.³ The court will not direct an inspection until, in the progress of the cause, it appears plainly to be required for the establishment of justice between the parties.⁴ And in an English case, of a complexion which plainly would render necessary an inspection should the cause proceed to a hearing, the court deferred the admission of the libel tendered by the husband, and gave the defendant wife an opportunity to reply by affidavits; whereupon, it appearing highly improbable the suit could succeed, the proceeding was dismissed.⁵

¹ 2 West. Law Jour. 131.

² Brown v. Brown, 1 Hag. Ec. 523, 3 Eng. Ec. 229; Devanbagh v. Devanbagh, 5 Paige, 554, 557.

³ Newell v. Newell, 9 Paige, 25.

⁴ Anonymous, Dean & Swabey, 295, 333.

⁵ Briggs v. Morgan, 2 Hag. Con. 324; s. c. 2 Phillim. 325, 1 Eng. Ec. 408. And see Aleson v. Aleson, 2 Lee, 576.

§ 595 [255]. On a like ground, if the order of inspection will probably hinder justice, not promote it, the order will not be made; or, if made, it will not be enforced. Were inspection always insisted upon, the defendant, in many cases, need only withdraw beyond the reach of the process of the court, to defeat the suit. Accordingly, where a defendant husband who had left the country gave in no answers, and refused to be inspected, a certificate (twelve years after marriage), that the woman was *virgo intacta*, and *apta viro*, coupled with his two several confessions to medical witnesses of incapacity, and proof of her health having suffered, was held to be sufficient.¹ Where the wife is defendant, and is out of the jurisdiction of the court, the allowance of her alimony may be suspended to compel her into submission to an examination.²

§ 596 [256]. When the woman is plaintiff in a suit of this sort, and the libel states her to have been a spinster at the time of the marriage, an inspection of her person, as well as of the husband's, is usual; because her virginity and capacity implies his incapacity.³ Indeed Dr. Lushington once remarked, that the court always requires a certificate of medical persons as to the condition of the woman;⁴ but probably the remark was intended only for such a case as the one under consideration, and for cases arising under the three years' rule, where the proof of incurable impotence consists, wholly or in part, in showing the non-consummation;⁵ since, in other cases, the woman seems not to have been inspected.⁶ Neither does any good reason appear, why, as a universal rule, she should be inspected; though, as was said in an old case, "the virginity of the woman is very

¹ Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308; Coote Ec. Pract. 368.

² Newell v. Newell, 9 Paige, 25.

³ Coote Ec. Pract. 367.

⁴ Pollard v. Wybourn, 1 Hag. Ec. 725, 3 Eng. Ec. 308. ⁵ Ante, § 585.

⁶ See Groenstreet v. Cumyns, ante, § 587, 3 Phillim. 10, 1 Eng. Ec. 165. And see Norton v. Seton, 3 Phillim. 147, 158, 1 Eng. Ec. 384, 386; Harrison v. Sparrow, 1 Curt. Ec. 1, 7 Eng. Ec. 357, 4 E. F. Moore, 96; post, § 600.

material;"¹ and, where she can make it appear, there is a propriety and usefulness in her doing so. But suppose she were not *virgo intacta*, having been deflowered before the marriage; she would still be entitled to a sentence of nullity, if she had married a man incurably impotent, from a defect obvious on examination.²

§ 597 [257]. This inspection is, in the modern Ecclesiastical practice, intrusted to three medical men; either two physicians and a surgeon, or two surgeons and a physician; nominated by the promoter, the adverse party having the privilege of naming, if he pleases, one or more of them.³ It appears formerly to have been performed, as to the woman, in whole or in part by matrons and midwives.⁴ The rule of the Ecclesiastical Courts, not followed on the hearing of divorce causes in this country, of requiring substantially two witnesses to each specific fact,⁵ renders it necessary, in those courts, that there be more inspectors than one. No reason however occurs, why we in this country should follow the English practice in this respect.

§ 598 [258]. The inspectors are sworn.⁶ Their certificate, according to the invariable practice in England, does not give reasons. "I should be extremely reluctant," said Dr. Lushington, "to depart from that practice. In the first place, it is a received maxim, *Quilibet in arte sua credendum est*. Secondly, if the grounds were given, how could the court comprehend the reasons, and decide between conflicting opinions? Besides, the introduction of the grounds would lead

¹ *Grimbaldeston v. Anderson*, cited 3 Phillim. 155, 1 Eng. Ec. 385.

² The new Divorce Court in England seems to hold very close to the rule requiring inspection, and to construe it as of somewhat more universally binding force than the foregoing sections represent it to be. *H. v. C.* 1 Swab. & T. 605.

³ *Coote Ec. Pract.* 388; *Deane v. Aveling*, 1 Robertson, 279, where the proceedings appear in full.

⁴ *Essex v. Essex*, 2 Howell St. Tr. 786, and Vol. I. § 335; *Ayl. Parer.* 228. In *Welde v. Welde*, 2 Lee, 580, the wife, who was libellant, was inspected by midwives, and the defendant by surgeons.

⁵ See ante, § 281, 282.

⁶ *Coote Ec. Pract.* 389.

the court into minute inquiries about matters the decision of which the court would be most anxious to avoid, unless it were imperatively called to pursue the investigation."¹ But, where the case requires, the inspectors may also be examined as witnesses.² Their certificate is usually considered merely in connection with other proofs; and Sir John Nicholl remarked, that, even as collateral, it is always taken with caution; he was aware of no case in which it had been admitted as sufficient alone.³ Yet in *Pollard v. Wybourn*,⁴ the certificate was certainly the leading proof of impotence; and it might be difficult to state any legal principle which would withhold from it, when admissible, full credit to the extent to which it should be found applicable. The parties may give evidence by other witnesses than the inspectors, of the same matters to which the certificate relates.⁵

§ 599 [259]. In the New York case of *Devanbagh v. Devanbagh*, where the proceeding was in equity, and the bill, brought by the husband, was taken for confessed, Chancellor Walworth gave the following directions: "There must be a reference to a master to take proof of the facts and circumstances stated in the complainant's bill; and particularly the master must inquire and report, whether the defendant, at the time of the solemnization of the marriage with the complainant, was physically incapable of entering into the marriage state, and whether she is still *virgo intacta*, and incapable of consummating the marriage contract, by reason of her own incurable impotence. The order of reference must also direct, that the master examine the defendant on oath as to the several matters alleged in the bill, and that the defendant

¹ *Pollard v. Wybourn*, 1 Hag. Ec. 725, 3 Eng. Ec. 308. In *Deane v. Aveling*, 1 Robertson, 279, 284, is the form of certificate, with some of the other proceedings.

² *Deane v. Aveling*, 1 Robertson, 279.

³ *Norton v. Seton*, 3 Phillim. 147, 1 Eng. Ec. 384, 387; *Rogers Ec. Law*, 2d ed. 641.

⁴ *Pollard v. Wybourn*, 1 Hag. Ec. 725, 3 Eng. Ec. 308. See also *Greenstreet v. Cumyns*, 2 Phillim. 10, 1 Eng. Ec. 165.

⁵ *Serrell v. Serrell*, 2 Swab. & T. 422.

submit herself to such surgical examinations, and examinations by matrons, as the master may think proper to direct, for the purpose of ascertaining the fact of the alleged impotence; but that no person shall be present at such examinations, except the surgeons and matrons who may be selected by the master for that purpose, unless with her consent; and that, in the selection of surgeons and matrons for that purpose, the master have a due regard to the feelings and wishes of the defendant. The master is also to be directed to return the proofs taken before him, in a schedule to his report. No person is permitted to be present before the master, on the reference, except the parties, and their counsel and witnesses, and such friends of either of the parties as they, or either of them, may request to attend the reference. And the complainant, under the direction of the master, must furnish the necessary funds to pay the expenses of the surgical examinations of the defendant, if a sufficient and satisfactory examination has not already been made.”¹

600 [260]. There are no special considerations of importance, as to the amount of proof, distinguishing these cases from others. As illustrative, the case of *Greenstreet v. Cumyns*, already stated, may be mentioned.² In *Harrison v. Sparrow*, also a suit promoted by the wife, the husband refused to undergo inspection, and was pronounced for the refusal in contempt. Then he appeared and offered to be inspected, but was refused. The certificate as to the plaintiff wife was in effect, “that there were no positive proofs of connection having taken place, or the contrary; but that there were decidedly no physical impediments to sexual intercourse.” There were also the husband’s confessions, and some collateral evidence. He admitted the non-consummation, but denied his inability. The parties had lived together in the matrimonial relation seven years. The court, satisfied there

¹ *Devanbagh v. Devanbagh*, 5 Paige, 554, 558. For the termination of this suit, see 6 Paige, 175.

² *Ante*, § 587.

was no collusion, gave sentence of nullity.¹ In *G—s v. T—e*, the parties had cohabited only three months; the husband's answers were taken to the libel; and the wife "and other witnesses" were examined,—but what their testimony was the case does not state. The inspectors certified in effect as to the wife, that there were no certain signs of virginity which could be relied on, yet that there was no evidence of perfect consummation having taken place. As to the husband, their certificate was: "We find no anatomical malformation; but, from oral information obtained, during a somewhat lengthened interview, we are decidedly of opinion that there is some physiological defect which has prevented him from completing the act of copulation. As we cannot discover any special cause to which a remedy can be applied, we fear this defect will be permanent." Dr. Lushington granted the divorce, remarking, "that he could not think of sending the lady back to renew cohabitation, though he could have wished that it had been more distinctly stated that her health had suffered, and was liable to suffer, by such cohabitation."² This decision seems to bear hard, though indirectly, against the doctrine which requires something like a triennial cohabitation where the defect is not obvious on inspection;—or, Is this to be regarded as a case of such obvious defect? In *Keith v. Keith*, where a divorce was granted, there was the testimony of three respectable men, who concurred in saying, that, a few days before the sitting of the court, they submitted the defendant to an examination, and found him destitute, in particulars they pointed out, of the members or qualifications of a man.³ Other illustrations may be seen on consulting, in the books of reports, the cases cited in the foregoing sections of this chapter, and the corresponding chapter in our first volume.

¹ *Harrison v. Sparrow*, 1 Curt. Ec. 1, 16, 7 Eng. Ec. 357, 359. Affirmed by the Privy Council, 4 E. F. Moore, 96, 103.

² *G—s v. T—e*, 1 Spinks, 389.

³ *Keith v. Keith*, Wright, 518.

CHAPTER XXXVI.

ADULTERY.¹

SECT. 601. Introduction.

602-611. The Allegation of Adultery in the Libel.

612-647. The Evidence.

§ 601. Most of the matters which pertain to what may be called the practice, in distinction from the pleading and the evidence, under this head of adultery, are discussed in other connections. And the remaining points will be found interspersed through the following sections of the present chapter, wherein we shall consider, I. The Allegation of Adultery in the Libel; II. The Evidence.

I. *The Allegation of Adultery in the Libel.*

§ 602. In the form of libel for divorce on the ground of adultery, given in Coote's Ecclesiastical Practice, the adultery is, in three of the eighteen articles which it contains, positively alleged; and the following are the words respectively: "That on some occasions of their being so alone together as aforesaid, they the said Arthur Vincent and Maria Theresa Grant had the carnal use and knowledge of each others bodies, and thereby committed the foul crime of adultery."—"That the said Arthur Vincent and the said Maria Theresa Grant, whilst so alone together on that day, had the carnal use and knowledge of each others' bodies, and thereby committed the crime of

¹ For the law pertaining to this ground of divorce, see Vol. I. § 703 et seq.

adultery." — "That on the said night the said Arthur Vincent and the said Maria Theresa Grant were alone, naked together in one and the same bed, and committed adultery."¹ In the form adopted by the present Matrimonial Court of England, two distinct allegations of adultery are made, in the following words: "That on the — day of —, 18—, and other days between that day and —, the said C. B. at —, in the county of —, committed adultery with R. S." — "That in and during the months of January, February, and March, 186—, the said C. B. frequently visited the said R. S. at —, and on divers of such occasions committed adultery with the said R. S."²

§ 603. There can be but little doubt, that, in this country, the words "committed adultery" are sufficiently descriptive of the act; and probably they always were so, as they are now, in England. There should be, however, accompanying words pointing sufficiently to the time, place, person with whom the offence was committed, and the like, to meet the demands of those rules of pleading which prevail in our law as respects other matters. And this observation will be found verified in various adjudged points now to be stated.

§ 604. When the name of the *particeps criminis* is known to the libellant, it must be given in the libel. When it is not known, the fact of its not being known must be stated; as, for instance, words like the following may be used, — "committed adultery with a person (or with some person) whose name is to your libellant unknown."³ It has indeed been by some persons urged, that to give in the pleadings the name of the *particeps criminis* would expose a third person who may be innocent, to scandal, and therefore the name should, when possible, be suppressed. And in a Mississippi case, it was

¹ Coote Ec. Pract. 323, 325, 327.

² Browning Div. Pract. 136.

³ Germond v. Germond, 6 Johns. Ch. 347; Wood v. Wood, 2 Paige, 108; Garrat v. Garrat, 4 Yeates, 244; Church v. Church, 3 Mass. 157; Choate v. Choate, 3 Mass. 391; Dunlap v. Dunlap, Wright, 210; Richards v. Richards, Wright, 302; Sanders v. Sanders, 25 Vt. 713; Mansfield v. Mansfield, Wright, 284; Bird v. Bird, Wright, 98; Morrell v. Morrell, 1 Barb. 318.

observed by the learned judge, that, though in the particular instance then under consideration the name might well enough have been given, "there are nevertheless good reasons why, in most cases, a different rule should prevail. Persons who are strangers to the controversy, and whose characters would suffer more or less, should not be implicated where they have no opportunity to be heard, unless reasonable certainty in the pleading could not be otherwise attained. As a general rule, it will be sufficient to set forth the time, place, and particular circumstances of the defendant's guilt, without introducing private scandal, which might subject the party pleading to an action for damages, in consequence of the injury thus done to the character of a third party. Reasonable certainty is all that is required, and the court will favor a rule which can attain this end, and at the same time preserve its records from unnecessary scandal."¹ Whatever may be the law of Mississippi, it is not the law of our States generally, that an action for a libel could be maintained against the libellant or his counsel, at the suit of the alleged *particeps criminis*, for the insertion, in good faith, of this matter in the libel, though the fact should really be contrary to what was alleged. The ends of justice require, that the accused person in the divorce suit be put in a position to know what he is charged with, and with whom; and the third person would suffer no more from having the name given, than from being just as distinctly pointed to by a circumlocution. Neither is the scandal worse in a pleading than in *viva voce* testimony. Dr. Lushington has well observed: "With respect to consequences that may result to third parties, however much the court may regret if any injustice or misfortune should accrue to them, yet justice must be done to suitors; so that, it is impossible to exclude matter which ought to be admitted in evidence, because, incidentally, it may affect the character and involve the conduct of those who are not parties to the suit. The rejection of matter on any consideration of this

¹ *Farr v. Farr*, 34 Missis. 597, 601.

kind would lead to great inconvenience and injustice.”¹ And the doctrine intimated in the Mississippi court does not prevail in our other States generally.

§ 605. Not only should the name, when known, be alleged, but the time and place also. In the Mississippi case mentioned in the last section, the allegation, which was held not to be sufficient, was as follows: “That the said Charles K. Farr [the defendant husband], at various times and upon various occasions since his marriage with complainant, has proven unfaithful to his marriage vow; in this, that the said Charles K. Farr has been guilty of adultery with a servant-woman of complainant, and with other females, in utter disregard of his duties as husband.” And it was observed, by Fisher, J.: “The rule appears now to be well settled in this class of cases, that the charge must be made with reference to some particular time and place, that the defendant may be able, not only to anticipate the proof which may be made against him, but that he may know to what particular time or place to direct his own proof. This allegation puts in issue the defendant’s course of conduct during the whole time of the matrimonial connection, a period of more than eight years, and it is not to be presumed that he could, by the use of reasonable diligence, prepare to meet proof that might be made against him by witnesses having this latitude.”²

§ 606. The doctrine is, that the allegations in the libel must be sufficiently specific to enable the defendant to understand them, and meet them by his proofs. “The only safe and prudent course,” observes Chancellor Walworth, “is to require the charge, whether of crimination or recrimination, to be stated in the pleadings and in the issue in such a man-

¹ *Croft v. Croft*, 3 Hag. Ec. 310, 320, 5 Eng. Ec. 120, 125.

² *Farr v. Farr*, 34 Missis. 597, 600, 601; *s. p.* *Clutch v. Clutch*, Saxton, 474; *Morrell v. Morrell*, 1 Barb. 318; *Christianbury v. Christianbury*, 3 Blackf. 202; *Church v. Church*, 3 Mass. 157; *Kane v. Kane*, 3 Edw. Ch. 389; *Burr v. Burr*, 2 Edw. Ch. 448; *Hare v. Hare*, 10 Texas, 355.

ner that the adverse party may be prepared to meet it on the trial."¹ When, therefore, the words were, "the complainant doth charge that the said defendant hath, in numerous instances, both before and since their separation, committed adultery in this State and elsewhere," the late Chancellor Kent, in a New York case, refused to send the case to a jury to try the issue, though the defendant had answered denying the allegation, and the plaintiff had filed his replication,—yet he suffered the bill to be amended on terms.² In an Alabama case, however, it was held, that, if the defendant answers a bill for divorce on the ground of adultery, the bill being defective in not alleging with whom the adultery was committed, or mentioning that the name is unknown to the complainant, this answer is a waiver of the objection, which cannot afterward be taken, though the objection would be fatal if made in proper form and time.³ In a Massachusetts case, "the libel for a divorce," says the report, "charged various acts of adultery, committed at divers times with persons unknown, for a period of eight years. The respondent moved, that the libel be quashed for uncertainty, or that the libellant be required to file a bill of particulars, at a reasonable time before trial, and be confined, on the hearing, to the case thus specified. Whereupon the court ordered, that a bill of particulars should be so filed."⁴

§ 607. To what extent the practice of permitting a libellant to supply a defective libel by a specification of particulars which, on general principles, should be found in the libel itself, may be resorted to in this country, the writer is not able with any accuracy to state. This practice seems to be allowable at least in Massachusetts and in Pennsylvania. In a Pennsylvania case, Yeates, J., observed: "If the adultery be stated to have been committed with E. P. and other lewd persons to the libellant unknown, if their

¹ Wood v. Wood, 2 Paige, 108, 113. And see Kane v. Kane, 3 Edw. Ch. 389.

² Codd v. Codd, 2 Johns. Ch. 224. And see Wood v. Wood, *supra*; Morrell v. Morrell, 1 Barb. 318.

³ Holston v. Holston, 23 Ala. 777.

⁴ Adams v. Adams, 16 Pick. 254.

names are afterwards known, written notice of them and of times and places should be given to the respondent, a reasonable time before the trial, without requisition. If their names are really unknown, the times, places, and attendant circumstances should be contained in the specification, so as to give the party charged a fair opportunity of defence against the accusation. Failing therein, I think the complainant should be precluded from giving particular instances in evidence on the trial on a general charge. Thus the essentials of justice would be preserved, and the party, being forewarned of the specific offence, would have full opportunity of showing his innocence; and the feelings of individuals, whose names might be inserted on the record on the slightest grounds, and who have no opportunity of defending themselves, would remain unwounded." The judge observes, however, that, without this specification of particulars, it has been not unusual in Pennsylvania to admit evidence, on the general allegation, of the specific matters, but this practice will hereafter be avoided.¹ In a New York case, before the Vice Chancellor, where the answer contained a general recriminatory charge of adultery, without specifying names, times, or circumstances, it was held, that the defendant could not, upon making up an issue to try the question of adultery, aid the general charge in his answer by an affidavit as to names, and the rest, so as to have the matter thus generally mentioned in the answer included in the issue.²

§ 608. Where, in a Massachusetts case, the libel alleged the act of adultery to have been committed out of the State, with a person unknown, and there was an appearance for the respondent, and the proof showed an act committed within the State, the libellant was permitted to have the divorce prayed. It was observed by the court: "The specific charges in a libel for a divorce for the cause of adultery are required to be made, if the fact be within the libellant's knowledge, in order that the accused party may not be surprised, and may

¹ *Garrat v. Garrat*, 4 Yeates, 244, 250.

² *Burr v. Burr*, 2 Edw. Ch. 448.

be advertised of the subject of his defence. Perhaps it would be better in all cases to hold the libellant strictly to those charges. But such has not heretofore been the practice of the court; and where, as in this case, there is an appearance for the respondent, such strictness may be less necessary."¹ On the other hand, where, in New Hampshire, the allegation in the libel was, that the defendant on a day named and at divers other times, as well before as since that time, committed adultery with a man named, and with divers other persons to the libellant unknown, at Hollis, N. H., and the proof was, that she committed adultery with a person other than the one named, not at Hollis, but at Nashua, N. H., more than two years before the specific day, Gilchrist, C. J., observed: "This is probably insufficient,"—but an amendment of the libel, to meet the proof, was permitted.² "A libel alleging that the respondent committed adultery with a particular person is not sustained by proof of adultery with any other person."³

§ 609. In criminal cases, as the reader is aware, there can be no evidence received of the criminal act committed out of the county in which the trial is had; because it is no offence in this county to have committed the act in another county. But the same rule does not apply to divorce cases. The general principles which govern these matters in civil and criminal jurisprudence may be referred to when the question is one of divorce. But this single suggestion should stand as the guide in most divorce cases; namely, that the time, the place, and the other circumstances are not of the essence of the offence; they, therefore, should not be required to be specifically proved, except where the specific proof is necessary to be insisted on in order to prevent surprise to the other party, and preserve good faith in the litigation.

¹ Washburn v. Washburn, 8 Mass. 131.

² Adams v. Adams, 20 N. H. 299, 301. And see further on this point, Germond v. Germond, 6 Johns. Ch. 347.

³ Adams v. Adams, *supra*; referring to Germond v. Germond, *supra*, and Washburn v. Washburn, 5 N. H. 195.

§ 610. It is quite plain, though there is no specific authority on the point, that in certain cases the form of the allegation must considerably differ from the form which we have been thus far contemplating. Suppose a wife finds her husband has contracted, since the marriage, venereal disease; and she thinks she can satisfy a court, that this disease came through adultery committed by him, yet she cannot point to the time, place, person of the *particeps criminis*, or any other specific circumstance connected with the adultery; or, suppose a husband has been absent from the country a year, and comes back and finds his wife pregnant;¹ in these cases, it cannot be sufficient to allege adultery in general terms, and no more, because the court cannot, until the proof comes, know the case to be one of this sort. Plainly, therefore, the libel should, besides stating the adultery in general terms, refer to the peculiar nature of the proof by which the allegation is to be supported. In this way, the object of the libellant will be accomplished, and the respondent will be notified duly and sufficiently of the nature of the charge. In accordance with this view, it was held in the English Ecclesiastical Court, that, where in a suit by the wife the husband's adultery is to be proved by the pregnancy of other women than the wife, and his acknowledgment of their children as his, it is not necessary to plead particular acts of adultery.²

§ 611. It is hardly necessary to say, that neither in the English practice nor in our own, neither in the Ecclesiastical practice nor in any other, is it any objection to a libel that it contains more than one charge of adultery. It may contain as many as the pleader chooses to put in it. And perhaps in some cases there would be no objection to pleading habitual adultery, in connection with the proper general mention of the persons participating therein, and of time, and of place.

¹ For a case like this, see *Heathcote's Divorce Bill*, 1 Macq. Scotch Ap. Cas. 277.

² *Durant v. Durant*, 1 Hag. Ec. 733, 746, 3 Eng. Ec. 310. And see, as further strengthening this view, *Moore v. Moore*, E. F. 3 Moore, 84; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773, note, 3 Eng. Ec. 329, 332.

A matter of this sort came before Dr. Lushington, sitting in the Consistory Court of London, and he observed: "The seventeenth article is objected to, as alleging habitual criminal intercourse, without particular specification of times and of dates. Now, I do not mean to say that this point is not attended with some difficulty, but yet, I apprehend, I should not be justified in rejecting this article; if you plead a long duration of time (in this case it is four months) during which a constant and habitual intercourse took place, that is sufficient without pleading specific facts; if you plead circumstances showing that the intercourse was limited, or of short duration, then you must plead the facts specifically."¹ The question, as it presented itself before this learned judge, was indeed somewhat interlaced with those peculiar considerations relating to a course of procedure in the taking of evidence, whereof we have no parallel in this country; but it is believed that these views may be suggestive to us regarding our own practice in particular circumstances.

II. *The Evidence.*

§ 612 [421]. The difficulty most embarrassing in these cases of adultery is generally found to lie in the evidence. A single act of adultery being sufficient to establish a cause, the plaintiff need go no further than show this act by his testimony. And in an aggravated case, though he will not be limited to proving only one act, yet he will be restrained from going quite uselessly beyond the requirements of the law.²

§ 613 [422]. Adultery is peculiarly a crime of darkness and secrecy; parties are rarely surprised in it; and so it not only may, but ordinarily must, be established by circumstan-

¹ *Graves v. Graves*, 3 Curt. Ec. 235, 241.

² *Richardson v. Richardson*, 1 Hag. Ec. 6, 3 Eng. Ec. 13. It is so also in cruelty. *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 7 Eng. Ec. 114.

tial evidence.¹ The testimony must convince the judicial mind affirmatively, that actual adultery was committed; since nothing short of the carnal act can lay a foundation for divorce.² But a fundamental principle, never to be lost sight of in these cases, is, that the act need not be proved in time and place; "circumstances," says Lord Stowell, "need not be so specifically proved as to produce the conclusion, that the fact of adultery was committed at that particular hour, or in that particular room; general cohabitation has been deemed enough."³ And Dr. Lushington in a late case observed: "It is not necessary to prove, that the adultery with which a party is charged should have occurred at any particular time and place. The court must be satisfied, that a criminal attachment subsisted between the parties, and that opportunities occurred when the intercourse in which it is satisfied the parties intended to indulge, might with ordinary facility have taken place."⁴ The court has therefore considered the offence established, when unable, from the evidence, to "come to a certain conclusion as to the particular period of time" at which it was committed.⁵ Yet Dr. Lushington has observed: "It is generally speaking necessary, as I apprehend, to prove that the parties were in some place together where the adultery might probably be committed. Were it indeed otherwise, it might happen that guilty intention would be mistaken for actual guilt; and this would be

¹ Ayl. Parer. 44, 45; *Matchin v. Matchin*, 6 Barr. 332; *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415; *Richardson v. Richardson*, 4 Port. 467; *Lawson v. The State*, 20 Ala. 65; *Mosser v. Mosser*, 29 Ala. 313; *Inskeep v. Inskeep*, 6 Iowa, 204.

² *Hamerton v. Hamerton*, 2 Hag. Ec. 8, 4 Eng. Ec. 13, 16, 19.

³ *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Ec. 461, 462; *Caton v. Caton*, 13 Jur. 431, 432; *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 5 Eng. Ec. 232, 234; *Tucker v. Tucker*, 11 Jur. 893, 894; *Dailey v. Dailey*, Wright, 514; *Hamerton v. Hamerton*, *supra*. "It will be sufficient, if the court can infer that conclusion, as it has often done between persons living in the same house, though not seen in the same bed, or in any equivocal situation." Lord Stowell, in *Burgess v. Burgess*, 2 Hag. Con. 223, 226, 4 Eng. Ec. 527, 529. And see *The State v. Poteet*, 8 Iro. 23.

⁴ *Davidson v. Davidson*, Deane & Swabey, 132, 135.

⁵ *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3, 16.

contrary to all principles of justice, as well as to known rules of jurisprudence.”¹

§ 614 [423]. “Courts of justice,” said Lord Stowell, “must not be duped. They will judge of facts, as other men of discernment, exercising a sound and sober judgment on circumstances that are duly proved,” judge of them.² “The only general rule,” he observed on another occasion, “that can be laid down upon the subject, is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion;”³ for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations,⁴ neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind, if they let themselves loose to subtilities, and remote and artificial reasonings upon such subjects.

¹ *Caton v. Caton*, *supra*.

² *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 448.

³ *s. p.*, see *Mulock v. Mulock*, 1 Edw. Ch. 14; *Richardson v. Richardson*, 4 Port. 467, 475; *Day v. Day*, 3 Green Ch. 444; *Ferguson v. Ferguson*, 3 Sandf. 307; *Inskip v. Inskip*, 5 Iowa, 204. Sir George Hay observed: “Ocular proof is seldom expected; but the proof should be strict, satisfactory, and conclusive.” *Rix v. Rix*, 3 Hag. Ec. 74, 5 Eng. Ec. 21. “It is physically possible,” observes Lord Stowell, “that persons may be in the same bed together without criminal intercourse. Courts of justice, however, cannot proceed on such ground; finding persons in such a situation as presumes guilt *generally*, they must presume it in all cases attended with these circumstances.” *Cadogan v. Cadogan*, 2 Hag. Con. 6, note, 4 Eng. Ec. 462; *Van Epps v. Van Epps*, 6 Barb. 320; *Burchet v. Burchet*, Wright, 161; *Bryant v. Bryant*, Wright, 156. But see *The State v. Way*, 6 Vt. 311.

⁴ When the facts relied upon are equally capable of two interpretations, one of which is consistent with the defendant's innocence, they will not be sufficient to establish guilt. *Ferguson v. Ferguson*, 3 Sandf. 307. And see *Kirby v. The State*, 3 Humph. 289.

Upon such subjects, the rational and legal interpretation must be the same."¹

§ 615 [424]. But this learned judge in another case said: "I take the rule to be, that there must be such proximate circumstances proved, as, by former decisions, or on their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed. The court will look with great satisfaction to the authority of established precedents; but, where these fail, it must find its way as well as it can, by its own reasoning on the particular circumstances of the case."² And the proof must be by legal evidence, applicable to a legal charge.³ Nor will the adultery be taken as proved merely because a witness testifies to it; for the court must be satisfied the witness is honest, not mistaken, his testimony true.⁴ When the testimony is credited, the facts it establishes will be viewed, not only separately, but in conjunction; for they interpret each other; and in combination they may lead to the inference of guilt, when separately they would not.⁵

§ 616 [425]. "Nor," observes Shaw, C. J., "can this course of inquiry and process of reasoning and judging be much aided by technical and artificial rules, or by what are considered established presumptions of fact from other facts. These rules are useful and convenient in their way, in suggesting general considerations, which are applicable to many cases; but, after all, they are to be taken with so many exceptions and so much allowance, that in the result each

¹ *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Ec. 461, 462. This may be considered the leading case upon the principles of evidence relating to this topic.

² *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415.

³ *Caton v. Caton*, 13 Jur. 431, 433; *Simmons v. Simmons*, 11 Jur. 830, 5 Notes Cas. 324; ante, § 278. There must be both allegation and proof. *Foy v. Foy*, 13 Ire. 90, 95.

⁴ *Bray v. Bray*, 2 Halst. Ch. 506, 628. And see post, § 620.

⁵ *Burgess v. Burgess*, 2 Hag. Con. 223, 228, 4 Eng. Ec. 527, 530; *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3, 16.

case must depend mainly upon its own peculiar circumstances. It is impossible, therefore, to lay down beforehand, in the form of a rule, what circumstances shall, and what shall not, constitute satisfactory proof of the fact of adultery; because the same facts may constitute such proof or not, as they are modified and influenced by different circumstances. Suppose, for instance, a married woman had been shown, by undoubted proof, to have been in an equivocal situation with a man not her husband, leading to a suspicion of the fact. If it were proved, that she had previously shown an unwarrantable predilection for that man; if they had been detected in clandestine correspondence, had sought stolen interviews, made passionate declarations; if her affection for her husband had been alienated; if it were shown that the mind and heart were already depraved, and nothing remained wanting but an opportunity to consummate the guilty purpose,—then proof that such opportunity had occurred, would lead to the satisfactory conclusion that the act had been committed. But when these circumstances are wanting; when there has been no previous unwarrantable or indecent intimacy between such parties; no clandestine correspondence, or stolen and secret interviews; the fact of opportunity and equivocal appearances would hardly raise a passing cloud of suspicion over the fair fame of such a woman. But though it is easy to pronounce, with confidence, between cases thus distinctly and broadly marked by the circumstances, yet rules of evidence drawn from them afford little aid in complicated cases, where minute shades of difference may vary the aspect of the proofs; and more especially where there is a direct conflict of testimony; where some of the testimony must be false; and where constant caution is necessary in weighing the credit due to witnesses, to prevent being misled by some or other of these false lights.”¹

§ 617 [426]. It has therefore been deemed particularly important to show circumstances leading to the adultery, ren-

¹ *Dunham v. Dunham*, 6 *Law Reporter*, 139, 141.

dering the commission of it probable; and the absence of such circumstances in evidence has been considered a strong indication against the party pursuing. "It is true," observes Dr. Lushington, "that in almost all cases adultery is clandestine; but it is equally true, in the great majority of cases, where the parties are cohabiting together, that, after the discovery of the fact of adultery, evidence is produced to show that it is probable. . . . This is a species of evidence the court always looks for; indeed requires, wherever the circumstances allow of its production, as was frequently observed by Lord Stowell."¹ In another case, where the charge was against the wife, the same eminent judge observed: "I have certainly felt pressed by the absence of all proof of indecent familiarity, of all proximate acts which might reasonably have been expected during this long intimacy. I have felt, too, that such a connection could hardly subsist without connivance, which I am not justified in suspecting. On the other hand, there is a long-continued intimacy, scarcely to be explained as consistent with innocence. The going into her bedroom, the nursing her child in his presence, his attention to the child, and the quarrel with her husband on his account, and no attempt at defence, and a child born during this intimacy,—looking at all these facts, I think I am judicially warranted in pronouncing the adultery proved with M. St. Rose; although I do not attempt to conceal, that I have arrived at this result with some difficulty."²

§ 618. And there is a case which came before the present English Matrimonial Court, in which the learned judges refused to give credit to the charge of adultery against a woman who for twenty years had been exemplary in her married life, though the charge was testified to by those who professed to be eyewitnesses. Said Cresswell, J.: "There is not a tittle of evidence to show, that, during the whole period

¹ *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 383; *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120.

² *Caton v. Caton*, 13 Jur. 431, 434.

of their cohabitation, she had done any thing to raise the slightest suspicion of her infidelity in the mind of her husband, or that up to the time of the alleged adultery she had in any way misconducted herself. The court is now called upon to believe, that Mrs. Alexander at once, without any preparation, condescended to disgrace herself with a groom who had been about two months in her husband's service, with so little regard for delicacy, with so little regard as to whether she was discovered or not, that she was guilty of acts of adultery with him in the face of day, without taking the precaution of pulling down a window blind, or closing a washhouse door."¹

§ 619 [427]. Every act of adultery implies three things: first, the opportunity; secondly, the disposition in the mind of the adulterer; thirdly, the same in the mind of the *particeps criminis*. And the proposition is substantially true, that, wherever these three are found to concur, the criminal fact is committed.² This proposition, however, should in reason be qualified thus: if these three things do concur, still the parties may not know the state of each other's minds

¹ Alexander v. Alexander, 2 Swab. & T. 95, 101, 102.

² Davidson v. Davidson, Deane & Swabey, 132; Inskip v. Inskip, 5 Iowa, 204; Westmeath v. Westmeath, 2 Hag. Ec. Supp. 1, 4 Eng. Ec. 238; Harris v. Harris, 2 Hag. Ec. 376, 4 Eng. Ec. 160; Bramwell v. Bramwell, 3 Hag. Ec. 618, 5 Eng. Ec. 232. In the last cited of these cases, which was a divorce suit against the husband, Dr. Lushington observed: "It is then in evidence, that not merely was there a criminal attachment, but also that this attachment was not rejected; that Jeffrey [the alleged *particeps criminis*] admitted his familiarity, received his correspondence, that opportunities were constant; and there is nothing to show on her [Jeffrey's] part, resistance, nor repudiation, nor that she at all discountenanced his passion. To doubt, from such circumstances, that the consummation followed, would be to presume, that the effect was not consequent on the natural cause; and that this was a case of extraordinary exception and singular innocence." See also Soilleux v. Soilleux, 1 Hag. Con. 373, 4 Eng. Ec. 434, where Lord Stowell observed: "When the criminal disposition of the man has been most satisfactorily proved, and when it is also proved that the conduct of this female was so different on former occasions when she had withstood his attacks,—if, after such a situation as is described in the evidence, she ceases to complain, her silence and submission furnish the strongest presumption, that his attempt here had been more successful."

on the subject, or they may be restrained by fear, or they may be under some temporary incapacity, or temporary absence of desire. And plainly wherever they do not concur, the offence is not committed. The proof of their concurrence may lie in detached testimony, no one witness being able to establish more than a single one or two of the links in the chain, or it may come in any other form.

§ 620 [428]. While circumstantial evidence usually proceeds on one or another of the before-mentioned propositions, it may proceed on quite different ones; as where adultery is proved against the wife, by showing the husband's non-access, and the birth of a child.¹ And the proposition by which we test the sufficiency of circumstantial evidence is, that, if the facts proved cannot be reasonably reconciled on the assumption of innocence, but are harmonious with the assumption of guilt, the court will infer guilt. On the other hand, if the facts can be reasonably reconciled on the assumption of innocence, or cannot be so on the assumption of guilt, the court will not infer guilt.² Circumstances merely suspicious are insufficient,³ though there are degrees of imprudence from which the offence will be presumed.⁴

¹ *Caton v. Caton*, 13 Jur. 431; *Richardson v. Richardson*, 1 Hag. Ec. 6, 11, 3 Eng. Ec. 13, 15; *Commonwealth v. Shepherd*, 6 Binn. 283; ante, § 610.

² *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160; *Dailey v. Dailey*, Wright, 514; *Langstaff v. Langstaff*, Wright, 148; *Ferguson v. Ferguson*, 3 Sandf. 307; *Inskeep v. Inskeep*, 5 Iowa, 204.

³ *Cooper v. Cooper*, 10 La. 249; *Grant v. Grant*, 2 Curt. Ec. 16, 55, 7 Eng. Ec. 3, 15; *Fraser v. Fraser*, 5 Notes Cas. 20. In *Johnston v. Johnston*, Wright, 454, a witness testified: "I have seen him [the defendant] at the house of Susanna Linos, late and early, to the neglect of his own woman; I have seen him hugging and nursing her in company, and I verily believe I might have seen more if I had wished." The court observed, that adultery might be suspected, but it was not proved. See *Wood v. Wood*, 2 Paige, 108, 112, for the statement of a strong case, where there was a verdict, apparently well founded, finding the adultery proved against a defendant who was afterward shown to be innocent. In a recent English case also, the evidence against the wife was quite strong, resting however on circumstances; but she proved to the satisfaction of the court, by the testimony of

⁴ *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 448.

§ 621 [429]. The stronger the affection, and the more perfect the concord, between married persons, the less likely is it that adultery will be committed. Therefore the terms on which the parties cohabited have been considered a material circumstance in this issue.¹ Thus, the withdrawal of the attachment of the defendant wife from her husband and family;² her expressions of strong dislike toward him and his family;³ alienation of feeling by the defendant husband from his wife;⁴ his desertion of her;⁵ are severally admissible, though not alone sufficient, in proof of the adultery. On other grounds, amicable intercourse between the husband and wife during the pendency of the suit, and while they are not in actual cohabitation, may be shown in defence; for this is sometimes thought to be inconsistent with the belief in the mind of the plaintiff, that the adultery he alleges has really been committed.⁶ So if the husband prosecuting a suit had, before the alleged adultery, manifested a wish to

surgeons who examined her person, that she was *virgo intacta*, having never been known by man. This case is remarkable, because she had already lived with her husband eight years. There was evidence of the husband's admission, that he had not himself consummated the marriage. *Hunt v. Hunt*, Deane & Swabey, 121.

¹ *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377; *Richardson v. Richardson*, 4 Port. 467, 474.

² *Caton v. Caton*, 13 Jur. 431, 432.

³ *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 122.

⁴ *Richardson v. Richardson*, 4 Port. 674; *Saunders v. Saunders*, 10 Jur. 143, 144.

⁵ *Caton v. Caton*, *supra*; *Kenrick v. Kenrick*, 4 Hag. Ec. 114, 138.

⁶ *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 381. In actions for criminal conversation, it is sometimes important for the plaintiff to show, that his wife was on terms of affection with him, before the defendant seduced her; and, for this purpose, her letters, written either to the husband or to third persons, anterior to the attempted seduction, are admissible. *Trelawney v. Coleman*, 1 B. & Ald. 90, 2 Stark. 191; *Willis v. Bernard*, 8 Bing. 376, 1 Moore & S. 584, 5 Car. & P. 342; *Elsam v. Faucett*, 2 Esp. 562; *Edwards v. Crock*, 4 Esp. 32; *Houliston v. Smith*, 2 Car. & P. 22, 24, 3 Bing. 127, 10 Moore, 482; *Wilton v. Webster*, 7 Car. & P. 198. So a witness who is acquainted with the wife may give his opinion, formed in consequence of such acquaintance, as to her affection for her husband. *Trelawney v. Coleman*, 2 Stark. *supra*. As illustrating which point, see *Campbell v. The State*, 23 Ala. 44. See also *Leary v. Leary*, 18 Ga. 696.

get rid of his wife, this will be deemed a circumstance to be weighed against him.¹

§ 622 [430]. In the practice of the Ecclesiastical Court, it was customary for the husband, proceeding on the allegation of his wife's adultery, where the parties had lived some time apart, to plead, in his libel, that he made her a competent allowance. And she was permitted, in her responsive allegation, to contradict the averment, and state what provision he did make. We have already seen, that it could not affect the legal rights of the parties, whether he made her a competent allowance, or deserted her, or not.² Dr. Lushington has observed: "I cannot conceive that the issue of this case can be determined by this question; still I think the wife may be permitted to show, that she had no competent maintenance; and perhaps, in this case, it may be of importance to explain how, and why, and where she lived."³ The suggestion should be made, however, for the guidance of American practitioners not familiar with the ecclesiastical practice, that this form of allegation has reference rather to the evidence, than to the rights sought to be established; and so it is not to be followed with us, as a matter of pleading. At the same time it shows us, that evidence on this point seems to be admissible under the proper circumstances; but it is deemed, that the proper circumstances for its admission would very rarely arise.

§ 623 [431]. Evidence of cruelty, as showing the terms of the matrimonial cohabitation, has always been received to strengthen the other proofs of adultery; though cruelty is itself a separate ground of divorce.⁴ "It adds," observes Lord Stowell, "greatly to the probability that such a charge is well founded, if it appears that" the defendant husband's

¹ *Bray v. Bray*, 2 Halst. Ch. 506, 628.

² *Ante*, § 88.

³ *Grant v. Grant*, 10 Jur. 103.

⁴ *Cocksedge v. Cocksedge*, 1 Robertson, 90, 94, 95; *Beach v. Beach*, 11 Paige, 161; *Smith v. Smith*, 2 Phillim. 67, 1 Eng. Ec. 190; *Eldred v. Eldred*, 2 Curt. Ec. 376, 7 Eng. Ec. 144. And see *ante*, § 58-60, 80, note.

"affections were visibly estranged from his wife, and therefore more likely to be diverted to other less worthy objects." ¹

§ 624 [432]. There is a New York case, which came before Vice-Chancellor McCoun, on the wife's bill, charging the husband with adultery; wherein, after a feigned issue as to this fact had been tried at common law and returned to the Vice-Chancellor's Court, a motion was made to set aside the verdict, on the ground, in part, that the common-law judge had admitted improper testimony to the jury. The fact was, that the common-law judge had permitted the plaintiff wife to prove acts of cruelty, for the purpose of showing, 1st, the husband's affections alienated; 2d, a course of abuse, from the time of his connection with the other woman, down to and terminating in the separation from the wife; 3d, such cruelty having resulted from his connection with the other woman, as part of a plan to drive the wife from his house, and render the improper intimacy more easy to be carried on. The Vice-Chancellor overruled the motion; and said, that he was of opinion the judge "was substantially right in the decision." But his observations showed a tendency of mind toward confining this class of evidence within narrower limits than the reasons we have just considered, and the English decisions, would seem to indicate. He said: "The acts of cruelty to be shown in evidence would have to be immediately, and not remotely, connected with the circumstances of adultery, so as to form one series of aggression on the part of the husband. As for instance, suppose that after a husband's intimacy with a paramour, and while he was pursuing a course of conduct totally inconsistent with his duty and fidelity as a husband (with evidence of some particular act, which might well be construed into a consummation of the offence, or, at least, afford a strong presumption against him), he should become abusive towards his wife, and follow it up by blows, or other personal injury, so as finally to drive her

¹ *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 360; *s. p.* *Arkley v. Arkley*, 3 Phillim. 500, 1 Eng. Ec. 461.

from his house, and should then receive the other into it;— I think this would be evidence proper to go to the jury, as showing, in the first place, the alienation of the husband's affections, and, in the second place, the *quo animo*, or intention, with which the cruelty was inflicted:— a just ground of inference would in such case be afforded, that his intimacy with the other woman was of an illicit and adulterous character, although it might not of itself, and disconnected from other circumstances, amount to evidence of adultery.”¹

§ 625 [433]. So also, as showing an adulterous intent, it is competent to give in evidence, not only the defendant's improper familiarities with the alleged *particeps criminis*, at times anterior to the fact charged,² and at times concurrent with the fact,³ but also his unsuccessful solicitations of the chastity of other women.⁴ And in the ecclesiastical practice, the plaintiff husband has been permitted to plead, that the conduct of his wife, during his absence, was so indecorous as to induce a lady with whom she resided to recommend her removal to her mother:⁵ this however is no example for us, in point of practice, only it shows that libidinous conduct in the wife is admissible in evidence against her. In a case wherein the evidence did not amount to judicial proof of the

¹ *Mulock v. Mulock*, 1 Edw. Ch. 14. In New York, cruelty is ground of divorce from bed and board only—adultery, from the bond of matrimony—and the two cannot there be united in one bill. In England, each is a ground of divorce from bed and board, and they may be joined. Vice-Chancellor McCoun intimated in this case, that a distinction would thence arise as to the extent to which cruelty might be evidence of adultery. But this suggestion appears to be fully met, first, by the reason of the English rule; secondly, by the fact, that in England cruelty may always and without limit be introduced into a recriminatory allegation of adultery, in a suit for adultery, though adultery is the only legal bar. See ante, § 80, note.

² *The State v. Wallace*, 9 N. H. 515; *Burgess v. Burgess*, 2 Hag. Con. 223, 4 Eng. Ec. 527; *Commonwealth v. Merriam*, 14 Pick. 518; *Norfolk v. Germaine*, 12 Howell St. Tr. 929, 945; *Commonwealth v. Lahey*, 14 Gray, 91.

³ *The State v. Marvin*, 35 N. H. 22.

⁴ *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 362; *Soilleux v. Soilleux*, 1 Hag. Con. 373, 4 Eng. Ec. 434. And see *Bray v. Bray*, 2 Halst. Ch. 628. But see *Washburn v. Washburn*, 5 N. H. 195.

⁵ *Croft v. Croft*, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 123.

wife's adultery, but her conduct had been so culpable as to raise strong suspicions of criminality, and induce the court to rescind the conclusion to admit further evidence; proof that, during the progress of the suit, the alleged *particeps criminis* had frequently visited her alone, and remained late at night, was received as sufficiently strengthening the former proof to justify the sentence of divorce.¹

§ 626 [434]. If a married man associates with prostitutes² or visits a brothel, without any apparent motive, and especially if when there he shuts himself up in a room with a common prostitute, — it must be inferred, in the absence of proof to the contrary, that he does this with the intent of committing adultery; and, as the opportunity and the undoubted consent of another party concur with his own intent,³ the offence must be presumed to be committed.⁴ Lord Stowell has observed: "The act of going to a house of ill-fame is characterized by our old saying, that people do not go there to say their paternoster; that it is impossible they can have gone there for any but improper purposes; and that it is universally held a proof of adultery."⁵ So if a married woman is seen going into a house of ill-fame with a man not her husband,⁶ or unattended,⁷ that is alone sufficient evidence of her adultery. And this species of proof has been considered to be more stringent when produced against the woman than

¹ *Hamerton v. Hamerton*, 3 Hag. Ec. 1, 5 Eng. Ec. 11. Facts tending to show adultery subsequent to the adulterous acts in issue would seem to be admissible or not, according as a connection is established or not, between the earlier and later transactions. *Lawson v. The State*, 20 Ala. 65; *The State v. Crowley*, 13 Ala. 172. See also 1 Greenl. Ev. § 47.

² *Ciucci v. Ciucci*, 26 Eng. L. & Eq. 604, 1 Spinks, 121. ³ Ante, § 619.

⁴ *Astley v. Astley*, 1 Hag. Ec. 714, 3 Eng. Ec. 303; *Kenrick v. Kenrick*, 4 Hag. Ec. 114, 124, 132; *Van Epps v. Van Epps*, 6 Barb. 320; *Langstaff v. Langstaff*, Wright, 148; *Richardson v. Richardson*, 4 Port. 467, 474. But see *Betts v. Betts*, 1 Johns. Ch. 197.

⁵ *Loveden v. Loveden*, 2 Hag. Con. 1, 24, 4 Eng. Ec. 461, 472.

⁶ *Best v. Best*, 1 Add. Ec. 411, 3 Eng. Ec. 158, 170; *Wood v. Wood*, and other authorities cited, 4 Hag. Ec. 138; *Matchin v. Matchin*, 6 Barr. 332, 338.

⁷ *Eliot v. Eliot*, cited in *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415, 417; Ayl. Parer. 45.

the man.¹ Obviously, however, such a visit is open to explanation; as it may be one of philanthropy,² or of accident, or even of lawful business, which should not be construed into an act of guilt.

§ 627 [435]. The visit of a wife to the lodgings or house of a single man may be a suspicious circumstance, and, connected with other circumstances, sufficient; but it will not alone establish guilt.³ Thus, where the windows were shut, and there were letters which could not be otherwise explained, such a visit was held to complete the proof.⁴ But in a recent case of this complexion, already referred to,⁵ the wife extricated herself from the pressure of presumption against her, by showing herself to be a virgin, never known by man.⁶

§ 628 [436]. Proof that a fact of marriage was celebrated between the defendant and the alleged *particeps criminis* does not itself go quite far enough; for it is still necessary to show a dwelling together, or an actual criminal intercourse.⁷ But the further proof of an ostensible living together as husband and wife will suffice in such a case.⁸ Where there was no celebration of marriage shown, the court refused to infer adultery from the mere unaided fact of the defendant and a woman living in the same house together, under the reputation of being married, while they were not.⁹ But if he gave currency himself to the repute, the evidence plainly would be stringent; and, in a case where there was no suspicion of collusion, it should, on principle, be deemed satisfactory.¹⁰

¹ Astley v. Astley, *supra*.

² For an interesting case, in which the defence of philanthropy was set up and failed, see *Ciocci v. Ciocci*, 26 Eng. L. & Eq. 604, 1 Spinks, 121.

³ *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415, 417.

⁴ *Ricketts v. Taylor*, cited in *Williams v. Williams*, *supra*.

⁵ Ante, § 620, note.

⁶ *Hunt v. Hunt*, Deane & Swabey, 121.

⁷ *Reemie v. Reemie*, 4 Mass. 586; *Wilson v. Wilson*, Wright, 128; post, § 639. And see *Ellis v. Ellis*, 11 Mass. 92; *Cayford's case*, 7 Greenl. 57.

⁸ *Nash v. Nash*, 1 Hag. Con. 140, 4 Eng. Ec. 357; *Masten v. Masten*, 15 N. H. 159, 161.

⁹ *Hart v. Hart*, 2 Edw. Ch. 207.

¹⁰ Post, § 629.

§ 629 [437]. Facts in themselves inconclusive may be made conclusive by proof of falsehood or concealment on the part of the offender. Thus, where the wife conceals from her husband meetings with the alleged paramour,¹ or conceals her having correspondence with him,² or the fact of his lodging at the house in the husband's absence;³ where the husband pretends, that a young woman with whom he is intimate is his niece, while she is not so;⁴ or, *a fortiori*, where a woman calls herself by a false name, and occupies the same room with a man not her husband, only one bed being in the room, for eight or nine months,⁵—adultery may, under the requisite attendant circumstances, be presumed. But a man will not ordinarily be supposed to have committed this offence, if his wife and child were on the same bed with him and the alleged *particeps criminis*.⁶

§ 630 [438]. Proof that the accused husband gave the woman presents of money, and articles of dress and ornament, may, in the absence of explanation, furnish strong suspicion, and, in connection with other evidence, establish the offence.⁷ Says an old Scotch writer: "The ordinary presumptions are, the being oft alone together, gifts, love-letters, close doors, the wife's being abroad all night, *nudus cum nudâ, et solus cum solâ*, the entertaining persons that are known to be pimps."⁸

§ 631 [439]. In considering presumptions of this nature, we should regard the peculiar modes of life of the parties,

¹ *Bramwell v. Bramwell*, 3 Hag. Ec. 618, 5 Eng. Ec. 232; *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401, 402.

² *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Ec. 461, 469, 470; *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 7 Eng. Ec. 114, 124; *Morse v. Morse*, 2 Hag. Ec. 608, 4 Eng. Ec. 220. ●

³ *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3.

⁴ *Kenrick v. Kenrick*, 4 Hag. Ec. 114, 129; *Harris v. Harris*, 2 Hag. Ec. 376, 4 Eng. Ec. 160, 167.

⁵ *Scroggins v. Scroggins*, Wright, 212.

⁶ *Scott v. Scott*, Wright, 469; *Smith v. Smith*, Wright, 644.

⁷ *Cocksedge v. Cocksedge*, 1 Robertson, 90, 98. ⁸ *McKen. Crim. Law*, 177.

of these causes, even though it appears, that, at a former time, he had infected his wife.¹

§ 633 [440 a]. Concerning the evidence which arises from one or the other or both of the parties having the venereal disease, if we reject the idea, certainly somewhat prevalent, that accident may bring the disease where the usual cause does not exist; and if, in a particular case, the disease is found to have a recent origin, long after the marriage,—then the conclusion is plain, that one or the other of the parties, or both of them, must have offended. Now, this being conceded, how shall we determine at whose door to lay the guilt? Often this cannot be ascertained; but, in a case of this kind, consulting reason rather than specific authority, evidence should be received of the entire course of life, and the associations and temptations, of the parties severally, the result of which would be, that sometimes the judge might become quite satisfied in the matter, sometimes not; and the divorce would be granted only when he was satisfied.

§ 634 [441]. Stains upon the husband's linen, though, it seems, admissible in proof, are not alone sufficient evidence of his adultery; since they do not necessarily establish even his infection with venereal disease. There may be discharges from other causes, which, when dry, would so nearly resemble those of syphilitic origin, as to render it impossible to distinguish the one from the other.²

§ 635 [442]. Another presumption sometimes relied upon in these cases is, that, when an adulterous intercourse is once shown to exist between persons, and they are still living together, or under the same roof, the unlawful connection

¹ Collett v. Collett, Jud. Com. of Privy Council, July 14, 1840, Wadd. Dig. 38. See also Stone v. Stone, 3 Notes Cas. 278, 290.

² Ferguson v. Ferguson, 1 Barb. Ch. 604.

also is deemed to be continuing.¹ And as a general proposition, when adultery between two persons is proved to have taken place, less evidence will suffice to establish a continuation of it, than would be necessary to establish the first offence.² But some of the cases seem to hold, that one of the parties is not permitted to prove, in the first instance, antenuptial incontinence in the other, and then call in the aid of this presumption;³ either because it would be contrary to good policy to allow such a course of proof to be pursued, or because a person entering marriage is understood to abandon unlawful pleasures. Yet in other cases, English, American, and Scotch, the antenuptial and post-nuptial conduct have, under the circumstances of those cases, been very properly connected together;⁴ and we may consequently find some embarrassment in saying what precise latitude should be given to the doctrine just announced. There appears also to be a doubt, whether, if condonation has passed, the condoned adultery may then be shown as foundation for inferring the subsequent adultery.⁵ Looking at these questions in the light of principle, we conclude, that, whenever a condonation has passed, or a marriage has taken place, a presumption arises of the party having abandoned all former connections. But where there is new and independent evidence pointing to a connection subsequent to the period of condonation or marriage, — not merely a living in the same house, but pertinent evidence directly pointing, —

¹ *Smith v. Smith*, 4 Paige, 432; *Beeby v. Beeby*, 1 Hag. Ec. 789, 3 Eng. Ec. 338, 342; *Turton v. Turton*, 3 Hag. Ec. 388, 5 Eng. Ec. 130, 136.

² *Armstrong v. Armstrong*, 32 Missis. 279.

³ *Graves v. Graves*, 3 Curt. Ec. 235, 7 Eng. Ec. 425, 427; *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158, 169; *Perrin v. Perrin*, 1 Add. Ec. 1, 2 Eng. Ec. 11; *Devall v. Devall*, 4 Des. 79.

⁴ *Ciocci v. Ciocci*, 26 Eng. L. & Eq. 604, 627, 1 Spinks, 121; *Lathan v. Proven*, 2 Scotch Sess. Cas. new ed. 250; *Van Epps v. Van Epps*, 6 Barb. 320; *Bray v. Bray*, 2 Halst. Ch. 628. And see *Simmons v. Simmons*, 11 Jur. 830, 5 Notes Cas. 324. In Connecticut, on a charge of keeping a house of ill-fame, the prosecutor was permitted to show, that the defendant's house was such anterior to the time when the statute, prohibiting the offence, went into operation, as aiding the proof of its character afterward. *Caldwell v. The State*, 17 Conn. 467.

⁵ Ante, § 60.

then the former connection may be shown as giving force to the inference of subsequent misconduct.

§ 636. This question, as respects incontinence committed before and after marriage, came before Dr. Lushington, in the Consistory of London, in 1854. He said: "No doubt, as a general rule, it is not competent to the husband or the wife to plead illicit intercourse prior to the marriage; because the doctrine universally maintained is, that marriage operates as an oblivion of all that has passed, and as oblivion of all that can possibly have occurred. . . . But the question which I have now to decide is, whether the special facts of this case do not make it an exception to the rule. The first fact to be noticed is, that the woman, with whom connection is pleaded before marriage, is continued in the service of the husband after marriage. The next fact is, that the adultery is charged to have taken place with this very same person. It appears to me that this circumstance does form a necessary exception to the rule, and one which I am bound to engraft upon it, and for a very obvious reason; because circumstances, which may be proved subsequently to the marriage, will have a very different complexion, whether they are taken standing alone, without reference to preceding circumstances, or whether they are taken in conjunction with antecedent criminal connection itself." After relying further upon the special fact of the woman being continued in the husband's service subsequently to the marriage, he concluded as follows: "It appears to me, that, where the adultery is pleaded to have taken place with the same person with whom there was a criminal connection antecedently, and where marriage took place subsequently, it forms an exception to the general rule; and I shall therefore admit the libel as it stands."¹

§ 637 [443]. In England, previous to Stat. 20 & 21 Vict. c. 85, the injured husband used ordinarily to bring his action

¹ *Weatherley v. Weatherley*, 1 Spinks, 193.

at common law, against the adulterer, for the criminal conversation, and afterward proceed in the Ecclesiastical Court for a divorce; pleading in this court his verdict, if he had obtained one. On ordinary principles, the verdict would seem to be quite inadmissible; for the defendant, against whom it is produced, was not a party to the proceeding in which it was rendered. And the Ecclesiastical Court has held, that a verdict in ejectment cannot be given in evidence in a testamentary cause.¹ But though the admission, in divorce suits, of verdicts obtained in actions for criminal conversation, was much resisted, their admissibility became at length fully established. The principal object of this evidence seems to have been, to rebut any presumption of collusion,² and to satisfy the court that the husband had honestly endeavored to obtain all the redress the law affords;³ but, though some of the cases might appear to give it a little more weight,⁴ they all agree, that it is in no proper sense evidence against the wife, and that its production does not place the husband on any better footing toward her, or lessen his burden of establishing by other proofs his allegations against her.⁵ There are no reported American cases, in which

¹ *Grindall v. Grindall*, 3 Hag. Ec. 259, 5 Eng. Ec. 101; *Price v. Clark*, 3 Hag. Ec. 265, 5 Eng. Ec. 103.

² *Ante*, § 26; *Price v. Clark*, *supra*; *Phillips v. Phillips*, 1 Robertson, 144, 156.

³ *Williams v. Williams*, 1 Hag. Con. 299, 4 Eng. Ec. 415, 418.

⁴ *Forster v. Forster*, 1 Hag. Con. 144, 4 Eng. Ec. 358, 364; *Chambers v. Chambers*, 1 Hag. Con. 439, 4 Eng. Ec. 445, 448; *Dillon v. Dillon*, 3 Curt. Ec. 86, 7 Eng. Ec. 377, 391; *Halford v. Halford*, Poynter Mar. & Div. 200, note.

⁵ *Williams v. Williams*, *supra*; *Loveden v. Loveden*, 2 Hag. Con. 1, 4 Eng. Ec. 461, 484; *Evans v. Evans*, 1 Robertson, 165, 170; *Best v. Best*, 1 Add. Ec. 411, 2 Eng. Ec. 158, 170. See also *Elwes v. Elwes*, 1 Hag. Con. 269, 4 Eng. Ec. 401, 410, note; *Williams v. Williams*, 3 Barb. Ch. 628. The verdict in a suit to which neither the husband nor wife was a party cannot be admitted. *Brisco v. Brisco*, cited 1 Hag. Ec. 165, 168, 3 Eng. Ec. 77, 78. In a late English case, where the husband sued on the ground of his wife's alleged adultery, Dr. Lushington refused to admit against him, a verdict obtained against him by a third person for necessities furnished the wife; the defence set up to the action for necessities having been, that she had committed adultery. "There can be no doubt," he said, "that verdicts against the alleged adulterer have been frequently admitted in pleading here—not however as proof of the adultery, but to show that the

such a verdict has been tendered to the court. Probably it would not be received, unless possibly under special circumstances.

§ 638. [444]. In some of the American States, adultery is punishable by indictment; and the question arises, whether, in those States, a record of the defendant's conviction of adultery is admissible in a suit for divorce, to prove the same adultery, and, if admitted, what weight is to be given it. The general doctrine is, that a judgment in a criminal cause is not, in a civil proceeding, where the party plaintiff is necessarily different, evidence of the fact upon which the conviction was founded.¹ But we have seen, that a divorce suit is really a triangular one, the government constituting the third party;² and so both the parties to the indictment are in fact parties in the divorce suit. Besides, it evidently must aid the conscience of the judge, in discharging his duty of protecting the public against divorces for sham offences, to know that this public has itself indicted and convicted the defendant. And when the defendant in the divorce suit has suffered himself to be defaulted; so that he cannot complain if judgment is rendered against him even without evidence,³ and only the interests of the public remain to be protected; it would seem, upon principle, that the record of conviction should be received as alone sufficient.

§ 639 [445]. The question of its sufficiency, where the respondent appears and defends, may not be so clear; but, as here the plaintiff could not have been a witness in the crim-

husband has not shrunk from exposing his witnesses to a *viva voce* examination. . . . But here is a verdict in an action between different parties, and for a totally different purpose. The very fact that the wife was examined shows, that the jury gave their verdict from other facts which were brought before them, since she would not be a witness to prove her own innocence." *Jenkyn v. Jenkyn*, Deane & Swabey, 268.

¹ 1 Greenl. Ev. § 537; 1 Stark. Ev. 219. But see *Maybee v. Avery*, 18 Johns. 352.

² Ante, § 230, 234.

³ Ante, § 236.

inal proceeding,¹ why should not the record *prima facie* establish the fact charged? In Maine it has been held sufficient, as well in a contested as a defaulted case, to prove both the marriage and the adultery.² In Ohio, a record of conviction for polygamy was adjudged insufficient proof of adultery; not because of any objection to this kind of testimony, but because the crime of polygamy is committed by merely entering into the second marriage; while adultery is the carnal act following, though not so necessarily following as to dispense with proof of it in the divorce suit.³ The report of this case does not show whether it was contested or not.⁴

¹ See 1 Greenl. Ev. § 537, note; 2 ib. § 45, note; Gilb. Ev. 32; *Maybee v. Avery*, 18 Johns. 352; *Nelson v. Evans*, 1 Dev. 9.

² *Anderson v. Anderson*, 4 Greenl. 100; *Randall v. Randall*, 4 Greenl. 326. On the hearing of a libel for divorce from bed and board on the ground of cruelty, a record of the defendant's conviction for assault and battery on the wife was offered in evidence, and objected to. It appearing that the defendant had pleaded guilty to the indictment, the record was admitted. *Bradley v. Bradley*, 2 Fairf. 367. But as a general proposition, a record of conviction upon a plea of guilty in a criminal cause is admissible, in a civil action against the same defendant, being a solemn judicial confession of the fact. 1 Greenl. Ev. § 537, note. In *Woodruff v. Woodruff*, 2 Fairf. 475, which was a libel for divorce on the ground of cruelty, a record of the conviction of the defendant husband for an assault and battery upon the wife was offered; but, it appearing that there was a trial in the criminal case, and that the wife was a witness, the record was rejected. In a similar divorce suit in Vermont, where a record of conviction was tendered, the court refused to receive it, except as proof of the fact of the conviction, observing: "It would not be proof of the assault and battery alleged, for the same reason that such a conviction is not evidence in a civil case, when the same matter comes in question; that is, that it might have been obtained upon the testimony of the person in whose favor it is offered." *Quinn v. Quinn*, 16 Vt. 426. In Connecticut, "in an action of book-debt," says Judge Swift, "the plaintiff claimed a right to recover for articles delivered to the wife of the defendant, on the ground, that, by extreme cruelty and personal violence, he had driven her from his house; and he offered, in evidence of that fact, the verdict of the jury convicting him in a public prosecution. But the court held, that such verdict was not admissible evidence to prove that fact; and that verdicts in public prosecutions for crimes could never be evidence in civil suits, although the same question of fact should arise." *Swift's Ev.* 20. And see *Maybee v. Avery*, 18 Johns. 352; *People v. Buckland*, 13 Wend. 592, 595; *King v. Chase*, 15 N. H. 9.

³ *Ante*, § 628.

⁴ *Wilson v. Wilson*, Wright, 128. See *Reemie v. Reemie*, 4 Mass. 586; *Patterson v. Gaines*, 6 How. U. S. 550.

§ 640 [446]. The English authorities appear to sustain the general doctrine here indicated. Thus in a suit for divorce from bed and board, for unnatural practices committed by the husband, the only evidence was the record of his conviction of an assault upon the person named, with intent to commit the offence. The Consistory Court of York, under the apprehension that a mere attempt was not sufficient to authorize the sentence, but, not doubting the sufficiency of the proof, rejected the libel. The High Court of Delegates, on appeal, admitted it, and pronounced for the divorce, which was followed by an act of parliament dissolving the marriage.¹ So, on a question of administration upon the effects of a deceased person, a conviction of polygamy is evidence, not conclusive, of the nullity of the second marriage.² At the same time, in a suit for nullity of a second marriage, it has been held to be competent for the defendant to set up the nullity of the first, in bar of the suit, although he has been convicted of bigamy in respect of such second marriage; the record of the conviction being considered, as it would seem, *prima facie* evidence, not conclusive, of the nullity.³ Obviously a judgment of acquittal would not bind the plaintiff; because he, against whom it is offered, was not a party to the suit; and because it ascertains no fact, but merely shows the government to have failed in making out its case. Thus, where one had been acquitted on an indictment for having

¹ *Bromley v. Bromley*, 2 Add. Ec. 158, note, 2 Eng. Ec. 260, *Poynter Mar. & Div.* 184, note. See also *Ellenthrop v. Myers*, 2 Add. Ec. 158, note, 2 Eng. Ec. 261; *Boyle v. Boyle*, Comb. 72, 3 Mod. 164; *Mogg v. Mogg*, 2 Add. Ec. 292, 2 Eng. Ec. 311.

² *Wilkinson v. Gordon*, 2 Add. Ec. 152, 2 Eng. Ec. 257. There is, however, an English case which came before the Matrimonial Court, wherein the wife brought her petition for divorce on the ground of her husband's "bigamy with adultery," where the husband had been convicted of the bigamy, and Sir C. Cresswell observed: "You must remember, that the bigamy must be proved. Proof of the conviction of bigamy will not suffice." *March v. March*, 2 Swab. & T. 49, 50.

³ *Bruce v. Burke*, 2 Add. Ec. 471, 2 Eng. Ec. 381; *Rogers Ec. Law*, 2d ed. 635. See also *People v. Buckland*, 13 Wend. 592; *Hudson v. Robinson*, 4 M. & S. 475, 479; *Drew v. Clark*, 2 Add. Ec. 102, 111, 113, 2 Eng. Ec. 242, 246, 248; *Maule v. Mounsey*, 1 Robertson, 40, 48; *Bray v. Bray*, 1 Hag. Ec. 163, 3 Eng. Ec. 76.

two wives, it was held, that the record was not evidence in a civil cause, where the validity of the second marriage was controverted.¹

§ 641 [448]. It is often important to show, what are called the identity and diversity of the parties to an act of sexual intercourse proved; namely, that one of them was the defendant, and the other was not the plaintiff.² To aid this part of the proofs, the Ecclesiastical Courts used sometimes to resort to what is termed a decree of confrontation, applied for on special grounds. On such a decree, it was necessary that the defendant should be produced to a witness who had known her in both characters of wife and adulteress, or to two or more witnesses at the same time who would separately identify her in each character.³

§ 642 [449]. The rules which govern the reception of the defendant's confessions in evidence, and the weight to be given them, have already been stated.⁴ Confessions of the *particeps criminis*, neither made in the presence of the defendant, nor communicated to him, are inadmissible.⁵ And it has also been held, that the acknowledgment of the wife's

¹ Gilb. Ev. 34. See further, 1 Phillips Ev. Cow. & Hill Ed. 336 et seq. and notes; Farchild v. Adams, 14 Law Reporter, 278, 281; United States v. Gibert, 2 Sumner, 19, 97; Anonymous, 2 Sim. N. S. 54, 11 Eng. L. & Eq. 281; People v. Buckland, 13 Wend. 592, 596, and cases there cited.

² Sullivan v. Sullivan, 2 Add. Ec. 299, 2 Eng. Ec. 314; Williams v. Williams, 1 Hag. Con. 299, 4 Eng. Ec. 415, 418; Dillon v. Dillon, 3 Curt. Ec. 86, 100, 7 Eng. Ec. 377; Hamerton v. Hamerton, 2 Hag. Ec. 8, 4 Eng. Ec. 13.

³ Searl v. Price, 2 Hag. Con. 187, 4 Eng. Ec. 524; Curtis v. Curtis, 5 E. F. Moore, 252, 10 Jur. 165. The form of a decree of confrontation may be seen in Coote Ec. Pract. 336.

⁴ Ante, § 240-251.

⁵ Burgess v. Burgess, 2 Hag. Con. 223, 4 Eng. Ec. 527; Harris v. Harris, 2 Hag. Ec. 376, note, 4 Eng. Ec. 160, 172; Croft v. Croft, 3 Hag. Ec. 310, 5 Eng. Ec. 120, 125; Matchin v. Matchin, 6 Barr, 332; Lawson v. The State, 20 Ala. 65. Where the defendant husband's intent to commit adultery was fully established, and nothing was wanting but the consent of the female on whose chastity he had made attempts, the subsequent conduct of that female was held to be evidence most stringent, of her having yielded to his solicitations. Soilleux v. Soilleux, 1 Hag. Con. 373, 4 Eng. Ec. 434.

agent, who, by her direction, took her child to be christened, made to the clergyman at the christening, that it was not the husband's child, but another person's, is not receivable; the agent himself must be called.¹ So the *particeps criminis* may, if willing to testify, be made a witness, whether the adultery is an indictable offence or not. "He is not thereby disqualified; and, although in practice it is a rare circumstance to find the paramour of the wife brought forward as a witness, it is not uncommon for the female accomplice to be produced, when the wife is complainant against her husband's adultery. The evidence of a paramour, however, must be corroborated;"² it is always to be listened to with caution.³ In Massachusetts, when an alleged *particeps criminis* was produced to prove the offence, the court said, they would not refuse to swear him; but, if his testimony showed himself to be the paramour, they should recommend to the solicitor-general to lay the case before the grand-jury. If the counsel should omit to ask the witness with whom the adultery was committed, the court would put the inquiry.⁴ In New York, the court refused to grant a divorce on the unsupported concurrent testimony of two prostitutes.⁵

§ 643 [450]. In those States in which adultery is not indictable, the husband or wife of the *particeps criminis* may be

¹ *Faussett v. Faussett*, 13 Jur. 688.

² *Best v. Best*, in the Arches Court, 1823, Poynter Mar. & Div. 198, note; s. o. in Consist. Court, 1 Add. Ec. 411, 2 Eng. Ec. 158, 170; *Simmons v. Simmons*, 11 Jur. 830, 5 Notes Cas. 324, 1 Robertson, 566; *Emmons v. Emmons*, Walk. Mich. 532; *Van Cort v. Van Cort*, 4 Edw. Ch. 621; *Lewis v. Lewis*, 9 Ind. 105; *Don v. Don*, 10 Scotch Sess. Cas. n. s. 1046.

³ *Astley v. Astley*, 1 Hag. Ec. 714, 3 Eng. Ec. 303, 304, 306; *Moulton v. Moulton*, 13 Maine, 110; *Van Epps v. Van Epps*, 6 Barb. 320; *Wood v. Wood*, 2 Paige, 108, 112; *The State v. Crowley*, 13 Ala. 172; *Thompson v. Thompson*, 10 Rich. Eq. 416, 424; *Ciocci v. Ciocci*, 26 Eng. L. & Eq. 604, 1 Spinks, 121. "Lucy Peacock [the person with whom the adultery was alleged to have been committed] herself must be considered as an accomplice; and all the legal considerations applicable to such a witness must apply to her." *Simmons v. Simmons*, 1 Robertson, 566, 571.

⁴ *Brown v. Brown*, 5 Mass. 320. And see ante, § 94, note.

⁵ *Turney v. Turney*, 4 Edw. Ch. 566. See also the Scotch case of *Sim v. Miles*, 12 Scotch Sess. Cas. 633.

a witness to establish the offence. But Vice-Chancellor McCoun who ruled this point, added, that, where adultery is punishable as a crime, the consequence is otherwise.¹ And this latter proposition plainly follows from the established doctrine, that one of the married parties cannot be heard in court accusing the other of crime.² Perhaps the rule should also be, that an infamous breach of matrimonial duty, and social decorum and decency, must not thus be revealed by a wife or husband against the offending one. On the other hand, in a late New Hampshire case, where there was an indictment for adultery, the husband of the female was the principal witness to prove the adultery; there was a conviction on this evidence, and the court sustained the conviction; but the witness testified "without objection," and this point was not discussed.³

§ 644 [451]. The majority of the Connecticut court held, that the respondent in a suit for divorce on the ground of adultery could not introduce proof of her good character, to rebut the presumptive evidence of guilt which the plaintiff had produced. The reason assigned was, that the divorce suit is a civil one, and that the right of showing a good character, where character is not the question directly in issue, is confined to criminal prosecutions.⁴ But probably this doctrine is not to be elsewhere followed. The principle which best commends itself to reason and modern authority is, that the rules of evidence are the same in civil and criminal causes, when the *issue*, which is the test, is the same.⁵ And elsewhere it is held, for example, in an action of slander, wherein the defendant pleads the truth in justification, that the plaintiff, in reply to the defendant's testimony, may introduce evidence of his good character, in analogy to the rule prevailing

¹ Van Cort v. Van Cort, 4 Edw. Ch. 621, 624.

² The State v. Welch, 26 Maine, 30.

³ The State v. Marvin, 35 N. H. 22.

⁴ Humphrey v. Humphrey, 7 Con. 116.

⁵ See 1 Greenl. Ev. § 65; Lord Chancellor Erskine, in *Melville's case*, 29 Howell St. Tr. 764; Vol. I. § 441; ante, § 263, note, 271.

in criminal proceedings.¹ And the doctrine, as applicable alike to criminal and civil suits, has been well expressed by Chancellor Walworth to be, "that, if a party is charged with a crime, or any other act involving moral turpitude, which is endeavored to be fastened upon him by circumstantial evidence, or by the testimony of witnesses of doubtful credit, he may introduce proof of his former good character."² It has therefore been specifically held in Missouri, that a defendant in a suit for divorce on the ground of adultery may introduce evidence of her general good character;³ while, on the other hand, in perfect accord with this doctrine, it has in New Hampshire been held, that a husband proceeding against his wife for a divorce for her adultery, cannot be permitted to show she has sustained the character of a lewd and unchaste woman.⁴

§ 645 [452]. The practice of the courts generally, in divorce suits, has been to receive evidence of character to an extent somewhat beyond even the practice of the common law courts in criminal cases. Still we have not decisions clearly defining how far this exceptional course is permissible, and probably most of our tribunals would discard altogether any such exception governing this particular class of cases. In Ohio it was laid down, in an adultery divorce suit, that the *complainant's* general reputation for chastity is always in issue, in cases of this sort; but not particular acts not pleaded by the defendant, and not the general reputation of the defendant.⁵ Plainly, if the defendant has not pleaded re-
crimination, he cannot rely on even the ill conduct of the plaintiff, much less can he on his ill character; according to the doctrine generally prevailing on this subject.⁶ In the

¹ *Harding v. Brooks*, 5 Pick. 244. Where the evidence was offered before the defendant had put in his testimony, it was rejected. *Cornwall v. Richardson*, Ryan & Moody, N. P. 305.

² *Townsend v. Graves*, 3 Paige, 453, 455; 1 Greenl. Ev. 5th ed. § 54, 55, and notes.

³ *O'Bryan v. O'Bryan*, 13 Miss. 16. ⁴ *Washburn v. Washburn*, 5 N. H. 195.

⁵ *Harper v. Harper*, Wright, 283. ⁶ *Ante*, § 334 et seq.

leading English case of *Evans v. Evans*, which was a suit for cruelty promoted by the wife, Lord Stowell observed: "The libel states the marriage at Calcutta, in the East Indies, in the year 1778; and it proceeds to plead the character of the parties; that he is a person morose, sullen, tyrannical, and so on; and that she is in every respect the reverse, a woman of a mild and tender disposition. These pictures are reversed, as is the usual manner, in the responsive allegation. It is usual in these sorts of causes to admit articles pleading in this manner the characters of the respective parties; it is usual, I say, to *admit* such articles, but I have not understood that it is usual to examine upon them, or at least to examine upon them in the proportion which has been done in the present cause. And I think that I feel the weight of some reasons which would induce me very much to question the propriety of *admitting* such articles at all, if they were likely, in other cases, to lead to the consequences they have done in this; for a very great part of this voluminous inquiry has turned, not upon the matter in issue in the present cause, but upon the general character of the two parties; and I have been loudly called upon on both sides, to determine that, which I am not called upon either by the nature of the authority which I possess, or by the necessity of the present case, to pronounce, the result of that evidence upon general character."¹ And the later forms of pleading in the Ecclesiastical Courts appear not to have contained this allegation, in suits either for adultery or cruelty.² But when cruelty is the offence alleged,³ there are peculiar considerations, which seem not to enter, at least not to the same degree, into the suit for other causes.

§ 646 [453]. Thus have we endeavored to present, in the foregoing sections, such points relating to the evidence as seem adapted to assist practitioners and judges called to the

¹ *Evans v. Evans*, 1 Hag. Con. 35, 4 Eng. Ec. 310, 313. And see *Dysart v. Dysart*, 1 Robertson, 106, 141.

² It is so, at least, with the forms given in Coote Ec. Pract. 320, 350.

³ Post, § 463.

consideration of these questions. But, after all, the help to be obtained from precedents is comparatively light. In probably most of our States, the question of fact is for a jury; and, in the other States, the judge will and should decide it substantially as he believes a jury would do.¹ The views contained in this chapter will, however, assist juries the same as they will judges.

§ 647. There are a few points, connected with the evidence of adultery as set forth in this chapter, about which there may be doubt as to their applicability in indictments for adultery; for perhaps a criminal tribunal would not, on an indictment for this offence, consider itself holden to follow the ecclesiastical decisions pronounced in matrimonial causes. This suggestion, however, is made only in the way of caution to practitioners; for, in sound principle, there should be no difference in the two classes of cases, and the English decisions should be received with the same respect, and permitted to have the same authority, when they relate to this subject as when they relate to any other. And although a nice scrutiny might find something to object against a single point or two made in the foregoing sections, it is believed that the doctrine, in the main, as there laid down, is as sound in legal reason as it is well sustained in authority.

¹ *Alexander v. Alexander*, 2 Swab. & T. 95, 101. The reader may consult, among other cases to which he is referred in this chapter, the following: *Caton v. Caton*, 13 Jur. 431; *Grant v. Grant*, 2 Curt. Ec. 16, 7 Eng. Ec. 3; *Richardson v. Richardson*, 4 Port. 467; *Hart v. Hart*, 2 Edw. Ch. 207, but query whether this was decided right; *Johnson v. Johnson*, 4 Paige, 460; *Bray v. Bray*, 2 Halst. Ch. 506, 628; *Hamerton v. Hamerton*, 2 Hag. Ec. 8, 4 Eng. Ec. 13; *Harris v. Harris*, 2 Hag. Ec. 375, 376, 4 Eng. Ec. 160, 169; *Mosser v. Mosser*, 29 Ala. 313.

CHAPTER XXXVII.

CRUELTY.¹

SECT. 648. Introduction.

649-655. The Pleading.

656-664. The Evidence.

§ 648. WHAT is to be said on the subject of this chapter will be divided as follows: I. The Pleading; II. The Evidence. If there are any matters of practice not already treated of, and important to be mentioned in this connection, they will be found under the one or the other of these two sub-titles.

I. *The Pleading.*

§ 649. The libel in cruelty must, in the nature of the offence, be in substance the same with us as it used to be in the English Ecclesiastical Court. And the reason is, that, as we shall see further on,² the acts which are testified to, as endangering the personal safety, and the like, of the party complaining, are parts also of the main charge which the libel sets forth; differing herein from adultery, where the acts testified to are usually such only as are attendant on the main one, from which attendant acts the main one is to be inferred; and the ecclesiastical libel performed the double service of stating in substance the evidence, and stating the legal fact on which the proceeding was based.³ There may,

¹ For the law relating to this ground of divorce, see Vol. I. § 714 et seq.

² Post, § 656.

³ Ante, § 221, 324.

indeed, be the proof by circumstantial evidence, of acts of cruelty; but this is not the form in which such a case usually presents itself; wherefore, as a general proposition, the demands of the law required no more to be alleged in the Ecclesiastical Courts than they require to be alleged in ours, as concerns specifically the main charge of cruelty,—a proposition, however, which does not, even in suits for cruelty, apply to the entire libel.

§ 650. The form of libel for cruelty, given in Coote's Ecclesiastical Practice, after setting forth that the defendant formed an adulterous connection with a woman named, proceeds as follows: "Ninth, That from the time the said H. formed the guilty connection before pleaded, to wit, the month of February, 1844, and until his said wife separated herself from him as hereinafter pleaded, he constantly treated her with the greatest violence and contumely; that he habitually called her an old bitch, a bloody or blasted old bitch, an old bawd, and the like opprobrious names, without the slightest provocation on her part; that he used to destroy the furniture of the house, break the windows, and do other acts of a nature to alarm or terrify his said wife; and the party proponent doth expressly allege and propound, that in consequence of such the ill-treatment of the said H., the health of the said Sophia became and still continues to be greatly impaired. Tenth, That on the evening of the 21st day of December, 1844, the said H. without any provocation on the part of his said wife, struck her as she was sitting on a couch in the drawing-room of their said house at Lewisham, so violent a blow on the eye with the back of his hand, upon which he wore a ring, that her eye was nearly closed, and became and remained black for many days afterwards, and was seen in that state by different persons; that the said H. then spat in the face of his said wife, and also threw a tumbler full of hot elder wine over her, and told her that thenceforward he should take his meals in a separate room, which he accordingly did for a long time after. Eleventh, That on the evening of the tenth day of September last, the said H., after

applying many abusive epithets to his said wife, urged her to allow him a further sum of 200*l.* per annum (she having, at the time and in contemplation of the said marriage, as the party proponent expressly alleges and propounds, settled upon him the yearly sum of 100*l.*), and upon her refusing so to do, rushed towards her in an infuriated state, and pressing one of his clenched fists hard upon her forehead, and shaking the other close to her face, roared out, 'Damn you, you bloody old bitch, it is fortunate for you that I am not drunk to-day,' or to that effect; and then said, seizing her by the arm and thigh, 'Shall I throw you out of the window, you bitch?' — adding, 'No, I will not to-day; but the next time I come home in such a temper, especially if I have had any gin, I will not answer for the consequence;' that the said H. then left the house, and did not return that night; that the said Sophia also the next morning left the said house, and has ever since lived separate and apart from her said husband, but that previous to her so leaving the said house she showed to ———, her servant, the marks on her arm produced and left by the violence of the said H."¹

§ 651. It is not easy to lay down such general rules as will guide the practitioner in all cases wherein he may desire to allege cruelty, concerning what the allegation shall contain. And the courts seem not, in this country, to be quite harmonious in their decisions upon the subject. Yet it is probably true everywhere with us, that to allege cruelty in general terms and in the mere words of the statute is not sufficient; the facts must, with greater or less minuteness, be set out,² and the court, when there is a trial by jury, is to decide on the sufficiency of the facts alleged, and the jury is

¹ Coote Ec. Pract. 354–356. The allegation of showing the marks to the servant is important in the ecclesiastical practice, but quite improper in ours; and this is a good illustration of the distinction between the differing systems.

² *Harrison v. Harrison*, 7 Ire. 484; *Lewis v. Lewis*, 5 Misso. 278; *Hill v. Hill*, 10 Ala. 527; *Wright v. Wright*, 3 Texas, 168; *Byrne v. Byrne*, 3 Texas, 336; *Wilson v. Wilson*, 2 Dev. & Bat. 377; *Conn v. Conn*, *Wright*, 563; *Nogees v. Nogees*, 7 Texas, 538; *Hare v. Hare*, 10 Texas, 355; *Brown v. Brown*, 2 R. I. 381; *Fellows v. Fellows*, 8 N. H. 160.

to find, whether or not the facts transpired.¹ To this general American doctrine, requiring the facts to be specified, the practice of the Vermont courts seems to furnish an exception.² In Alabama it has been laid down, that a bill for divorce need not set forth specifically every act of cruelty complained of; one or two instances will suffice, and the rest may be given under the general charge.³ And where the wife's allegation was, that the husband, "soon after their marriage, commenced treating her, and did treat her, with cruelty and inhumanity; that on various occasions he has inflicted blows upon her in anger, and with much violence, thereby endangering her health and life; that he has refused to supply her with the necessaries and comforts of life, when it was in his power to supply her with them; that he still persists in this course of treatment towards her; and that she cannot, with any degree of comfort or safety, continue longer to live with him," this was held by the Alabama court to be sufficiently definite and certain.⁴ It was also held in this State, that, where the bill is in general terms, and it does not descend to particulars, the defect can be taken advantage of only on special demurrer.⁵ Probably, however, a rule so narrow as to the method of taking advantage of the objection does not prevail in all the other States.⁶

§ 652. Plainly, both on the authorities cited to the last section, and on general principles of pleading, there may and should be, in these cases, besides the particular allegations of specific facts, a general allegation concerning the habit and demeanor of the party complained against in his matrimonial relations with the complainant. It is of the utmost

¹ *Harrison v. Harrison*, supra; *Wright v. Wright*, supra; *Byrne v. Byrne*, supra.

² *Sanders v. Sanders*, 25 Vt. 713.

³ *Reese v. Reese*, 23 Ala. 785.

⁴ *Smedley v. Smedley*, 30 Ala. 714. See also *Hughes v. Hughes*, 19 Ala. 307.

⁵ *Hill v. Hill*, 10 Ala. 527. And see *Lewis v. Lewis*, supra; *Breinig v. Breinig*, 2 Casey, 161, and *Butler v. Butler*, 1 Parsons, 329, as to which, see ante, § 606, 607; *Steele v. Steele*, 1 Dal. 409.

⁶ And see *Wilson v. Wilson*, supra.

consequence, in these cases, that this matter should be shown in evidence; and surely it should not be so shown, without a proper averment in the petition, libel, or bill.¹

§ 653 [463 a]. Concerning what may be shown against a party, outside of the particular allegation, the question may sometimes be one of difficulty; but, on the whole, the doctrine best established in reason permits the broadest latitude to be given to inquiries concerning the general conduct and deportment of the parties to one another; provided, of course, there is sufficient allegation of specific fact to lay a proper foundation for such testimony, and the allegation of the specific matter is also established in evidence. But without this foundation, no considerate judge would suffer himself to listen to general statements of mere general deportment and bearing. In a Missouri case, a learned judge observed: "It is obvious, that, in cases of this kind, the attention cannot be confined to the particular act or acts alleged as a ground for a divorce, but the inquiry must necessarily involve the conduct of the parties to each other for the period during which it is alleged that the misconduct took place. It is not like the case of a bill for divorce for adultery or any other specific act, on the proof of which the complainant by law becomes entitled to a divorce, but the cruelty in most cases which gives cause for a divorce must be evidenced rather by general conduct than by particular acts. The act or acts alleged may be proved, but a divorce would not follow as a matter of course." Yet, to prevent misapprehension, he adds further on: "We do not maintain, that a single act of cruelty may not be evidence of so depraved a heart, and be accompanied with such circumstances, as would authorize a divorce; but we speak generally of cases for divorce on the ground of cruelty."²

§ 654. The pleader should be as accurate as possible, in

¹ See post, § 657, 658.

² Scott, J., in *Doyle v. Doyle*, 26 Misso. 545, 546, 547. And see post, § 656-658.

these cases, in stating the times and places at which the cruelty was inflicted; but, suppose the evidence departs herein from the allegation, the variance would not, under all circumstances, be fatal. On this point, the reader is referred to matter which will be found under the title Adultery.¹ In a case tried before a jury in the English Matrimonial Court, the petition charged the cruelty to have been committed "in and during the months of April and May, 1861," and the cruelty proved was in the months of June and July of the same year. The Judge Ordinary, there being no discussion as to whether the evidence would do without an amendment, allowed the petition to be amended to meet the evidence, observing: "When a cause is tried by a jury, I have the same power of amendment as a judge of a court of common law has when sitting *à nisi prius*. I think that such a variance in time may be amended."²

§ 655 [496]. We have seen,³ that matter of recrimination and the like must always be shown by the party who relies upon it in bar. So of the plaintiff's misconduct coming short of what bars strictly in recrimination, as considered in the first volume:⁴ the defendant must prove it, for it will not be presumed.⁵

II. *The Evidence.*

§ 656 [496 a]. In a certain aspect, almost the entire law of cruelty may be considered as belonging to the evidence. The reason is, that in each case the leading inquiry concerns the future danger, rather than the past misconduct. Yet the courts regard what has been done as constituting, in a certain sense, the foundation of the proceeding for divorce; whence it is looked upon as being of the substance of the complaint. The true way however to regard the acts of cruelty, as they

¹ Ante, § 608, 609.

² *Bunyard v. Bunyard*, 32 Law J. n. s. Mat. 176.

³ Ante, § 334 et seq.

⁴ Vol. I, § 764-768.

⁵ *Rumball v. Rumball*, Poynter Mar. & Div. 237, note; *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 7 Eng. Ec. 114.

are called, is to consider them as occupying a double position, — the one, as being the gravamen of the injury alleged; the other, as furnishing evidence of danger to be apprehended. In both these aspects, they were treated of in our first volume. There remain a few points, relating to the evidence proper, as distinguished from the evidence thus explained, to be examined in the concluding sections of this chapter.

§ 657 [497]. In accordance with this view we have seen, that the law does not so deem the danger to be of the essence of the complaint as to preclude the necessity for the complainant to set out, in his pleadings, the specific acts of cruelty. And he must establish, in evidence, so much of the alleged cruelty as constitutes ground of divorce; but he need not do more.¹ In New York, where the statute (following the common-law rule) requires the several acts of violence to be specifically alleged; it is held, that the acts so alleged present the matters in issue, to which the proofs must be directed, but that, under the general allegation in the bill as already explained,² the court will look into the general conduct of the defendant toward the plaintiff, for the purpose of understanding more fully the circumstances complained of, and how the parties lived together.³ And we have already seen, that, according to the common doctrine, weight may be given to matters not pleaded, though they cannot be the foundation or only ground for the divorce.⁴ In a New Jersey case, however, the Chancellor observed: "The evidence should have been confined to the specific charges in the bill, whereas it has in reality been little short of a history of all the family quarrels for the last twenty years, a recital at all times disgusting and painful, and never to be resorted to but from the strongest necessity."⁵

§ 658 [497 a]. In an Alabama case the court considered

¹ *Lockwood v. Lockwood*, 2 Curt. Ec. 281, 7 Eng. Ec. 114; ante, § 612.

² Ante, § 652, 653.

³ *Whispell v. Whispell*, 4 Barb. 217.

⁴ Vol. I. § 727; ante, § 653.

⁵ *Graecen v. Graecen*, 1 Green Ch. 459, 460. Contra *Rees v. Rees*, 23 Ala. 785.

the point last stated, and arrived at what seems to be a just conclusion, as follows; that specific acts of cruelty, not alleged by the complainant, cannot be made the foundation of the decree of divorce; yet that the court may consider such acts, as explanatory of the acts alleged, and as giving weight to them; while, also, the alleged acts must be proved in substance as stated in the pleadings, but they need not be exactly in respect of all their non-essential circumstances. Said Goldthwaite, J.: "The strictest application of the rule does not require, that more than the substance of the issue should be proved; and, if the specification was that the defendant beat the complainant severely with a stick, while the evidence showed that it was done with a whip, the variance would be altogether immaterial. So if the charge was, that the violence was inflicted in different modes, only one of which was established, it would be enough; for the substance of the charge is, that the particular violence offered amounted to cruelty, and the charge is supported by showing any violence of a like kind, which could be regarded as cruel within the meaning of the statute."¹ That the general demeanor of the parties to one another, in distinction from specific acts of cruelty, is always in evidence in these cases, we have already seen.²

§ 659 [498]. If marks of violence are found upon the wife, it does not follow, that they were caused by the husband.³ But if she makes complaint of the injury, *recenti facto*, such complaint, with the marks, may be shown; because, from the nature of these transactions, unless this kind of evidence were received, the husband might inflict ill-usage upon his wife when the parties were alone, and she be left without the possibility of redress. And if a wife complains, *recenti facto*, to her maid; and afterward, but not *recenti facto*, to her physician; still the latter complaint, though not direct

¹ David v. David, 27 Ala. 222, 224. See also, as to a point of practice, Breinig v. Breinig, 2 Casey, 161.

² Vol. I. § 727; ante, § 650, 651, 657.

³ Dysart v. Dysart, 1 Robertson, 106, 118.

evidence of ill-usage, has been held to be admissible as strengthening the statement, and confirming the credit, of the maid.¹

§ 660. In an Upper Canada case, which was a suit for alimony, but governed by the same principles as a suit for divorce, it appeared, that a few days after the departure of the plaintiff wife from her husband's house, she was found to have upon her person severe bruises and injuries, which, in the opinion of medical men, must have been caused by external physical violence, and not by a fall or other accident. And the husband having been shown to have used violence toward her on other occasions, and in other ways to have so conducted himself as to raise a strong presumption that the bruises and injuries were inflicted by him, the court made the decree for alimony upon this evidence. Said Spragge, V. C.: "I do not find from the evidence, that she stated how or from whom she received them. To Bryan Fenwick she did not state that she had been injured or ill treated by her husband at all, but assigned other reasons for leaving her husband's house. . . . Upon this I observe, that the wife giving these reasons to Fenwick, is not to my mind proof that she had not received personal injuries from her husband." Again: "She left her husband's house a short time before she was seen with these injuries upon her person. She is seen with injuries upon her, inflicted by some person, not the result of accident. She left her husband's house suddenly, a short

¹ Lockwood v. Lockwood, 2 Curt. Ec. 281, 7 Eng. Ec. 114, 121; Dysart v. Dysart, 1 Robertson, 106, 114, 470, 497. See Waring v. Waring, 2 Phillim. 132, 1 Eng. Ec. 210, 213. So in a suit against the wife for desertion: her declarations, made on the night of flying from her husband's house, have been held admissible evidence in her favor. Cattison v. Cattison, 10 Harris, Pa. 275. On the ordinary principles of evidence, Professor Greenleaf observes: "Wherever the *bodily or mental feelings* of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are original evidence." 1 Greenl. Ev. § 102. And see further, on questions of this nature, Reg. v. Walker, 2 Moody & R. 212; Rex v. Jagger, 1 East P. C. 455; Reg. v. Osborne, Car. & M. 622; Phillips v. The State, 9 Humph. 246; Commonwealth v. McPike, 3 Cush, 181; Kennard v. Burton, 25 Maine, 39. Of course, in cases of divorce, the party's testimony, as such, is not admissible. Manchester v. Manchester, 24 Vt. 649.

time, one or two days, before ; her husband had previously struck her. I think the presumption is so strong that he, and not another person, inflicted these injuries, that I do not hesitate to fix the act upon him.”¹

§ 661. There are, in the books, some nice discussions as to when the declarations of the wife may, in this class of cases, be admitted against the husband ; but a simple reference to the cases is nearly all which it is deemed best to give of the matter here.² In a Pennsylvania case it was held, that, in an action by a husband for enticing away his wife, her declarations made just before and at the time of leaving her husband, indicating ill treatment by him of her, were admissible in evidence for the defendant.³

¹ *Jackson v. Jackson*, 8 Grant, U. C. Ch. 499, 502, 504.

² *Johnson v. Sherwin*, 3 Gray, 374 ; *Cattison v. Cattison*, 10 Harris. Pa. 275 ; *Jacobs v. Whitcomb*, 10 Cush. 255 ; *Palmer v. Crook*, 7 Gray, 418 ; *Phillips v. Kelly*, 29 Ala. 628.

³ *Gilchrist v. Bale*, 8 Watts, 355. In this case, the evidence offered is stated by Rogers, J., as follows : “To disprove the allegation in the declaration, that the wife deserted her husband by the advice and at the procurement and solicitation of the defendants, they offered to prove by her attending physician, that, about ten days before Mrs. Bale left her husband, she complained that he had treated her badly ; that she showed marks on her arms, which she said she had received from his beating her ; and asked him what she should do. That he advised her to go to her father’s and leave her husband.” Upon the matter of law, it was observed by this learned judge : “It is a general rule, that the declarations of a husband or a wife cannot be received in evidence against each other, either civilly or criminally. But this rule cannot be extended to all possible cases ; for, where no confidence has been violated, the law has admitted of some exceptions. Thus in *Aveson v. Kinpaired*, 6 East, 188, in an action by the husband on a policy of insurance on the life of his wife, declarations by the wife, made by her when lying in bed, apparently ill, stating the bad state of her health, &c. and her apprehensions that she could not live ten days longer, by which time the policy was to be returned, are admissible in evidence to show her own opinion of the ill state of her health at the time of effecting the policy. In the argument, it was stated by counsel, that the declarations by the wife upon her elopement from her husband, accusing him of misconduct, could not be given in evidence against him in an action against the adulterer. To this Lord Ellenborough replied : ‘It is not so clear that her declarations, made at the time, would not be evidence under any circumstances. If she declared at the time that she fled from immediate terror of personal violence from her husband, I should admit the evidence, though not if it were a collateral declaration of some matter which happened at another time.’ For the same case, in illustration, his lordship referred

§ 662 [499]. The question of admitting a record of conviction for an assault and battery, obtained in a criminal prosecution, has been already considered.¹ A late Pennsylvania case holds, that the respondent husband, sued by his wife for cruelty, cannot show, in his defence, an unsuccessful attempt by her to have him bound over to keep the peace. Said Black, J.: "She was not a party to it [the proceeding] in any sense that would make it binding on her. Nor does it appear to have any relation to the subject-matter of the present dispute."²

§ 663 [500]. The English doctrine, resting well on principles applicable to this peculiar offence, permits the demeanor of the parties at times subsequent to the bringing of the suit, to be taken into the account in determining, whether a renewal of the cohabitation would be safe.³ And the same doctrine has been maintained in Georgia.⁴ Yet the Louisiana court held otherwise, observing: "It has been urged, that, since the inception of this suit, the aggravated ill-treatment of the husband towards his wife ought to be taken into consideration by us in deciding on the case. We do not feel authorized to do so. The only question we have to examine is, whether the facts, alleged as having occurred before

to *Thompson v. Trevanion*, *Skinner*, 402, where, in an action by the husband and wife for wounding the wife, Lord C. J. Holt allowed what the wife said immediately upon the injury received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the *res gestæ*. The motives which induced Mrs. Bale to desert her husband are the matters in controversy; and his conduct, about that time, has a material bearing on the issue. The defendants allege that she left him, not for the cause assigned in the declaration, but because of his wicked and brutal conduct. This, in most cases, cannot be shown, except by her declarations made at the time to her relations and friends. Few persons are so lost to every sense of propriety as to act thus in public. The treatment of which she has most reason to complain, is usually acted in secret, and can only be known from her complaints, or, as here, from marks of violence on her person," p. 356, 357, 358.

¹ Ante, § 639, note.

² *Breinig v. Breinig*, 2 *Casey*, 161.

³ *Westmeath v. Westmeath*, 2 *Hag. Ec. Supp.* 1, 4 *Eng. Ec.* 238, 298; *Vol. I.* § 718.

⁴ *Johns v. Johns*, 29 *Ga.* 718.

the suit was brought, are sufficient to justify a separation.”¹ Plainly the facts alleged, and existing at the time of suit brought, must be the ground of the proceeding;² yet it is not easy to see, why they may not receive color as well from what has happened since, as from what took place before.³

§ 664 [501]. The admissions of the defendant, in cases of cruelty, “whether in words, or by the absence of the denial of charges which every innocent man would, if he could, deny with indignation, are,” observed Dr. Lushington, “important evidence; for they are the best and most creditable testimony the *res gestæ*, under the circumstances, can admit of.”⁴ Still a divorce for cruelty is never granted, more than for adultery, on the unaided confessions of the party.⁵ The rules and principles applicable to this matter have been already discussed.⁶ “Affectionate letters, from a wife” to her husband, “are not necessarily inconsistent with cruelty on the part of the husband; though they may be so, they are not necessarily so.”⁷

¹ *Tourné v. Tourné*, 9 La. 452, 457, Bullard, J.

² See *Ferrier v. Ferrier*, 4 Edw. Ch. 296.

³ Vol. I. § 727; ante, § 657.

⁴ *Saunders v. Saunders*, 1 Robertson, 549, 558.

⁵ Ayl. Parer. 229.

⁶ Ante, § 240-250.

⁷ *Saunders v. Saunders*, supra, p. 565. And see *Johns v. Johns*, 29 Ga. 718.

CHAPTER XXXVIII.

DESERTION.¹

SECT. 665. Introduction.

666-669. The Plaintiff's Allegation.

670-681. The Evidence.

682, 683. Locality in which the Suit is to be maintained.

§ 665. THE matters to be examined in this chapter will be divided as follows: I. The Plaintiff's Allegation; II. The Evidence; III. The Locality in which the Suit is to be maintained.

I. *The Plaintiff's Allegation.*

§ 666. The form and substance of the allegation of desertion have not been much discussed in the cases. It was observed, however, in Texas: "Where desertion without sufficient cause and against the consent of the other party is ground for divorce, it is not sufficient to state that the libellee unnecessarily and without sufficient cause abandoned the libellant; but the circumstances attending the desertion must be particularly stated, that the court may judge of the legal sufficiency of the complaint." And it was added: "The plaintiff should state such facts as will show, that the abandonment was really voluntary or without sufficient cause on the part of the [defendant] wife, and was the offensive desertion contemplated by the statute."² The words of the statute

¹ For the law relating to this ground of divorce, see Vol. I. § 771 et seq.

² *Hare v. Hare*, 10 Texas, 355, 359, opinion by Hemphill, C. J.

are not given in this case ; but, in our States generally, it is believed not to be necessary for the libel for divorce on the ground of desertion to do more than, in substance, follow the words of the statute in the description of the offence. Upon general principles, it would not be necessary, neither would it be proper, to set out in the libel those particular circumstances and facts attending the desertion, wherefrom, as matters of evidence, the intent to desert, and the like, are to be inferred.

§ 667. The statute of Missouri provided for a divorce "when either party has absented himself or herself, without a reasonable cause, for the space of two years." And a libel under this statute alleged, that the defendant wife, on a day named, left the plaintiff husband without any cause whatever on his part, and that she has "been absent from him for more than two years." Here, the reader perceives, the language of the statute was not followed, even in substance. "It is true," said Gamble, J., "that it is alleged that the wife left the plaintiff on the 20th October, 1850, without any cause whatever, but the continued absence for two years is not connected with this departure, nor is it alleged that the continuance of the absence was without a reasonable cause." Wherefore the allegation was held not to be a sufficient foundation whereon to rest a decree for divorce.¹ In like manner, in Tennessee, where the statute authorized the divorce for "wilful and malicious desertion, or absence by the husband or wife, without reasonable cause, for the space of two years," the court held, that the libel must cover, in its averment of the desertion, the idea conveyed by the words "wilful and malicious."² Likewise in New Hampshire, the statute of which State provided for a divorce "where the husband shall willingly absent himself from the wife for the space of *three years together*," &c.; and the allegation was, that he "willingly absented himself from her *more than three*

¹ Freeland v. Freeland, 19 Miss. 354.

² Stewart v. Stewart, 2 Swan, Tenn. 591.

*years ago," &c.,—this was held not to be sufficient, as not coming within the terms of the statute. Said the court: "The defect in this libel is, that, although it is alleged that the husband absented himself from the wife more than three years ago, it is not averred, that he has absented himself for the space of three years together. All that is alleged in this libel may be true, and yet the husband may have never absented himself from the libellant for the space of a week since his intermarriage with her."*¹

§ 668. In Alabama it was held to be, in the language of Chilton, J., "sufficient for the bill to aver the marriage, that the complainant has resided in this State three years next before its exhibition, and that the husband has left her for the space of three years without the intention of returning." There is no need, that the readiness of the complainant at all times, during the three years, to receive and live with her husband, should be averred.²

§ 669. We saw, in the first volume,³ that the legal offence of desertion, though described in different language in the statutes of the various States, is, in legal contemplation, substantially the same in all. But it does not thence follow, that what would be a good libel for divorce for the desertion in one State, would be equally a good one in every other State. Those gentlemen of the profession who are familiar with pleadings drawn upon statutes will need no illustration of this proposition; and it is not, for any purpose, deemed best to extend the discussion further here. Let it, however, be observed, that, for reasons which will occur to every practitioner, there is a wide difference between adultery and cruelty, on the one hand, and desertion, on the other hand, in respect to the matter now under consideration.

¹ *Hancock v. Hancock*, 5 N. H. 239, 240.

² *Gray v. Gray*, 15 Ala. 779, 782.

³ Vol. I. § 773.

II. *The Evidence.*

§ 670. The law and evidence relating to desertion are so closely connected together, that it is not easy to separate the one from the other. Some of the points stated in our first volume may therefore be deemed points of evidence; while, in another aspect, various points to be stated in this volume, under the present sub-title, are points of law.

§ 671. The two prominent, and perhaps the only essential, things to be proved in these cases are, first, the cessation of cohabitation; and, secondly, the intent, in the mind of the defendant, to desert the other party.¹ There are cases which favor the idea, but probably none which distinctly lay it down as legal doctrine, that the plaintiff must show affirmatively an absence of consent on his part to the separation.² But upon principle, there is no need to prove this negative in order to make out the case; because, if there was a consent, this is matter of defence to be brought forward on the other side. Therefore we may not impute such a doctrine to Sir C. Cresswell, though, in giving construction to the English statute, the words of which are "desertion without cause," he made use of the following language: "There is a difficulty in defining 'desertion;' and cases may arise in which it would be very difficult to say whether the facts proved would fall within the meaning of the statute. Without attempting to lay down a precise definition of 'desertion,' I think it undoubtedly must mean, a wilful absenting himself by the husband; and that such absence and cessation of cohabitation must be in spite of the wish of the wife; she must not be a consenting party."³ And the same may perhaps be said of the Chancellor of New Jersey, who observed:

¹ See Vol. I. § 777.

² *Thompson v. Thompson*, 1 Swab. & T. 231; *Smith v. Smith*, 1 Swab. & T. 359; *Jennings v. Jennings*, 2 Beasley, 38.

³ *Thompson v. Thompson*, *supra*, p. 333.

"To establish a case of desertion, it should appear that the wife left her husband of her own accord, without his consent and against his will; or, that she obstinately refused to return, without just cause, on the request of her husband."¹ Yet it is plain, that, in many cases, if it lies in the party's power to prove this negative, such proof will be of essential service in establishing the fact truly in issue.

§ 672. From the like principle of law with the one discussed in the last section it follows, that, where a separation and intent to desert are once shown to exist in concurrence, both the separation and the intent will be presumed to continue, until the contrary appears.² Thus it was observed by Dewey, J., in a Massachusetts case: "The fact of her leaving him, declaring her intention no longer to live with him, being shown, her absence must be taken to be wilful, and being unexplained it must be taken to have been unjustifiable; and, if no subsequent facts had been shown to qualify or excuse the continuance of the desertion, she would after five years have forfeited her marital rights, and subjected herself to a libel for divorce from the bonds of matrimony on the part of the husband."³

§ 673. There is no one royal road over which the proof must travel in these cases. It is often important to show the circumstances attending upon the original desertion;⁴ often the language which the parties made use of at the time of leaving one another, or so near the time as to be a part of the transaction, is important, while it is always admissible;⁵ the confessions or declarations of the opposing party, made subsequently to the separation, are in many

¹ *Jennings v. Jennings*, *supra*.

² 1 Greenl. Ev. § 41, 42; *Gray v. Gray*, 15 Ala. 779. But see *Crossman v. Crossman*, 33 Ala. 486.

³ *Hall v. Hall*, 4 Allen, 39, 40.

⁴ *Kimball v. Kimball*, 13 N. H. 222; *McCoy v. McCoy*, 3 Ind. 555.

⁵ *Fulton v. Fulton*, 36 Missis. 517, 527. And see *Bennett v. Smith*, 21 Barb. 439.

cases desirable to be shown.¹ The main matter being the intent to desert, whatever points to the intent is relevant. Proof of the cessation of the cohabitation is indeed necessary, but it alone does not constitute desertion, and proof of it alone is not sufficient.² It was observed in a California case: "Desertion consists in the cessation of matrimonial cohabitation, and the intent to desert." And it was added: "The former is [in this particular case] proved by positive testimony, and the latter appears inferentially from the fact of the abandonment without apparent cause. The plaintiff is not required to show negatively that no cause existed; for, none appearing, the law will not presume one. The presumption is, that there was none, and that the defendant intended the consequences resulting from his acts."³

§ 674 [520]. Though, as we have seen,⁴ the separation and desertion may not be identical in the time of their commencement, yet generally they are. The courts have not, as yet, laid down any particular rules of evidence for determining, whether a separation does or not, as matter of proof, amount to a desertion; perhaps the question does not admit of such rules, but each case must rest on its own circumstances. Still the intent to desert is a fact of which the court must, in some way, be affirmatively satisfied.⁵ It is important to disclose the particulars which preceded and accompanied the separation.⁶ So the single fact of a protracted absence may assist the presumption concerning the original intent.⁷ "The husband's desertion," says Shaw, C. J., "may be proved by a great variety of circumstances, leading with more or less probability to that conclusion; as, for instance,

¹ *Word v. Word*, 29 Ga. 281; *McCoy v. McCoy*, *supra*.

² *Cook v. Cook*, 2 Beasley, 263.

³ *Morrison v. Morrison*, 20 Cal. 431, 432, opinion by Cope, J.

⁴ Vol. I. § 784.

⁵ *Friend v. Friend*, Wright, 639; *Brainard v. Brainard*, Wright, 354; Vol. I. § 777.

⁶ *Kimball v. Kimball*, 13 N. H. 222; *Bishop v. Bishop*, 6 Casey, 412, 415.

⁷ *Ahrenfeldt v. Ahrenfeldt*, 1 Hoffman, 47; Vol. I. § 783.

leaving his wife with a declared intention never to return; marrying another woman, or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances.”¹

§ 675 [518]. In Ohio, on a petition by the wife for a divorce from her husband, the proof was, that, eight years before, “*all* her property,” in the words of the report, “was taken in execution and sold, to pay his whiskey debts.” She removed to Cincinnati, and he lived with her, most of the time drunk, for several years, and doing no good; when she refused to support him any longer; and he left her house about five years ago. Her character is, in general, good; but she has expressed a desire to be rid of her husband, in order that she might marry some one else.” The court said: “The wife has driven off her husband, and now seeks a divorce because of his *wilful* absence. She was doubtless right in refusing to live with or support a husband always drunk, but that does not make the case wilful absence on his part.” The petition was therefore dismissed.² The facts of this case are not presented with sufficient fulness to enable us to draw from it any specific rule of law. As a general doctrine, the husband and wife should no doubt mutually labor for the promotion of their common interests; and, if she has capacity and health to earn a livelihood for herself and husband, while he has neither, she should earn it.³ But

¹ Gregory v. Pierce, 4 Met. 478.

² Healer v. Healer, Wright, 210. In an Alabama case, a husband, having left his wife without just cause, proposed to her through a third person to be reconciled; which she declined, saying, she “had made up her mind not to live with him any longer.” When she afterward sued for a divorce the court refused it, on the ground that her declaration showed her consent to the separation. Crow v. Crow, 23 Ala. 583.

Vol. I. § 818.

the wife's duty can hardly be, under any circumstances, to support a merely drunken husband, who will not work, much less to supply him with intoxicating drinks; and, if she refuses to do this, and for the refusal he leaves her, it would appear to be as much a desertion as if he left her because she was not sufficiently young or handsome. Neither should her right be barred because of her wish to avail herself of it,¹ and be rid of such a husband, and promote her happiness by marrying a better.

§ 676 [519]. In another case, decided by the same court, the parties were married in Germany, whence they removed to Ohio. Here the husband collected all the wife's property, converted it into cash, and went back to Germany, never, as he said, to return. *She afterward expressed a wish that he never would return.* After he had been away during the statutory period, without being heard from, she sustaining meanwhile a good reputation, the court decreed a divorce on her prayer.² Where, however, on a suit by the wife, the husband was shown to have left her for a distant place, declaring he could not live with that woman, and would not; but she followed him, and shortly afterward came back, saying he was to pay her a certain sum of money, and she to have a divorce; the court dismissed her bill, on the ground, that the whole evidence showed only a separation by agreement, which could not be enforced in this proceeding.³

§ 677 [521]. Where a wife soon after the marriage left her husband, saying she would not be confined to *one man*, and did not afterward return, the desertion by her was held to be established.⁴ Where the parties had been married while the man was under arrest upon a bastardy process, issued on complaint of the woman; and he, ever after the marriage, refused to live with her; this was held to be suffi-

¹ Ante, § 29.

² *Guembell v. Guembell*, Wright, 226. And see *Fraroll v. Fraroll*, Wright, 455.

³ *Mansfield v. Mansfield*, Wright, 284.

⁴ *Milliner v. Milliner*, Wright, 138.

cient evidence of desertion by him.¹ So where, in a suit by the wife, the evidence was, that several years after the marriage the husband left her and her children, without any apparent cause, and continued absent during the statutory period, and until the bringing of the suit, without contributing to her support ;² where, also, without any known cause, the husband went off and had not been heard of ;³ where, moreover, the husband sent his wife to her father's, in a town remote from their residence, saying he would follow her in a short time, but did not follow her for several months, and, when he did, remained with her only for a brief period, and then left her, without in any way providing for or corresponding with her,⁴—the desertion was held to be sufficiently proved. On the other hand, where it appeared, in the husband's suit, that he left his wife with a scanty supply, and went off for months to labor on the canal ; and, when he returned, found she had gone to her friends ; this, with the further fact of her having been overheard to say, after the separation, she could not live with him again, was held to be insufficient proof of her having deserted him.⁵

§ 678 [522]. In another case, which was a suit by the wife, "the cause alleged for this divorce," says the report, "is wilful absence for more than three years. It appeared in evidence, that the defendant was frequently absent, and from sheer laziness wholly neglected to provide for his family. He was a physician, and went, as he said, *doctoring about the country*. One time, when he had been gone several days, and left no provision whatever for his family, she went to her father's, about eight miles off. When he returned, and had learned where his wife was, instead of going for her, he left the country, and has since been absent more than three years, without contributing at all to the support of the wife, who continues to reside with her father." The divorce was

¹ McQuaid v. McQuaid, Wright, 223.

² White v. White, Wright, 138.

⁴ Wyatt v. Wyatt, Wright, 149.

³ Roberts v. Roberts, Wright, 149.

⁵ Frarell v. Frarell, Wright, 455.

granted.¹ A husband took to drink, neglected his family, became quarrelsome, then a complete vagabond. The parties disagreed, he left, was afterward most of the time drunk about the streets; while she lived by herself, supported the family respectably, maintained a good reputation. Then he stole away from her a little boy, his son, and said he meant to keep him, and did not intend to live with the family again. She was held to be entitled to a divorce.² In a Kentucky suit it appeared, that soon after the marriage in Indiana, the husband left his wife with the intention of abandoning her, who, being poor, went back to her former residence in Kentucky. Within six months he returned to the place where he had left her, but found she had gone. The court held, that it was not her duty to remain at the precise spot where he deserted her, and that her right to a divorce was not taken away by her return to Kentucky.³

§ 679 [523]. A husband let to a tenant his dwelling-house, as he announced, "with a view to a permanent separation." He directed the tenant, however, to treat his wife well, and permit her to remain as long as she chose. The next day she also left, and never went back. During the same week, and after her departure, he returned to the house, and continued to occupy it alone. The court considered these facts as sufficiently showing a desertion by him; there was an actual separation, effected in pursuance of an intent in his mind to separate.⁴

§ 680. Where a husband, in embarrassed circumstances, put his wife for a temporary sojourn into a family not his own, then went away promising to return soon; she, a fortnight afterward, went back to her own house, and there found an execution in the house; she wrote to her husband several

¹ *Amsden v. Amsden*, Wright, 66. ² *Clark v. Clark*, Wright, 225.

³ *Fishli v. Fishli*, 2 Litt. 337. Divorce for desertion was also decreed in *Johnston v. Johnston*, Wright, 454; and *Thompson v. Thompson*, Wright, 470. The proof was held insufficient in *Jones v. Jones*, 13 Ala. 145.

⁴ *Logan v. Logan*, 2 B. Monr. 142. See also *Hanberry v. Hanberry*, 29 Ala. 719.

times, but got no answer ; the furniture being sold, she went into lodgings ; sent persons to him to induce him to return, but he said it was not convenient, he had debts to collect which would not allow him to come away,—it was held, that at this latter time there was a desertion ; though he once made a sort of vague offer to rejoin his wife, and four years later wrote her a letter in which he bade her “farewell forever.” Said Cresswell, J. : “They had a home, and he refused to return to it. I was anxious to ascertain whether he had subsequently offered to provide a home, but by the petitioner’s answer I gather that he never made any definite or distinct proposal or offer of another home. He deserted the original home, and has provided no new one.”¹ But where the husband went away in search of employment, and the wife neglected to answer his letters, it was held, that there was no desertion, though he failed to return.²

§ 681. There is a late English case, the decision of which, according to the report of the testimony given in the book of reports, is contrary to the result to which most American judges would arrive. The husband was a drunken spendthrift, abusive to his wife, upon whose earnings he lived ; he one day told her, that he was going to leave town, that she should never see him again, and then went away, taking his clothes, &c., with him. After going away, he lived in adultery, and made no offer to return ; but, on the contrary, when a witness urged him to do something for the support of his wife, who was in ill-health, he said he would do nothing voluntarily ; and, if any attempt were made to force him, he would leave the town where he then was, as he was determined to have nothing more to do with her. Here, as it appears to the author, is complete evidence of desertion ; and, if this is not to be taken as sufficient, seldom can a wife prove a desertion. But the desertion in this case was held not to be proved, and probably because of the existence of

¹ Cudlipp v. Cudlipp, 1 Swab. & T. 229.

² Thompson v. Thompson, 1 Swab. & T. 231.

facts now to be stated : When the husband had left the house, the wife continued to remain in it for about a fortnight, and then, without making any inquiries for him, went to her sister's, where she resided up to the time of bringing the suit, principally supporting herself by dress-making. Said the Lord Chancellor : "The petitioner has this difficulty to contend with. She has not shown that the respondent knew where she was living after he left her. . . . There is nothing to satisfy the court, that, when the parties separated, the husband went against the will of his wife. On the contrary, there are circumstances in the case which induce the court to believe, that it is extremely probable that they parted by mutual consent. It is shown that the respondent was a man of vile habits and bad temper, and treated the petitioner with great cruelty ; and that, on one of the last occasions they were together, he told her he should leave her, and that she might walk the streets for a living," &c. The real cause of this determination of the court, may probably be seen in the words of the Lord Chancellor, who observed : "It is necessary that the court should be very strict indeed in regard to the proof of the circumstances which enable the wife to obtain a decree of dissolution of marriage."¹ The better view is, that, for the court to give any remedy, it should be satisfied on the evidence of the existence of the facts on which the right to the remedy rests ; but it is for the law-makers, not the judges, to decide whether the proper form of remedy for a particular matrimonial offence is a judicial separation or a dissolution of the marriage bond. In this case, the wife did not indeed prove that she was not glad to be deserted by a worse than worthless husband, neither was the contrary shown. If she had been glad, but did not consent, that would be no bar to her remedy. If in a case the proof shows merely an absence by the husband, it does not go far enough ; but the deficiency may be filled in one of two ways, — either the wife may show, as here, that the husband went away originally, or that he afterward staid away, with the

¹ *Smith v. Smith*, 1 Swab. & T. 359, 360, 361.

intent to desert; or, that she did not consent to the parting. There may still be circumstances to bar the remedy; but, if they exist, they should be brought forward in defence.

III. *The Locality in which the Suit is to be maintained.*

§ 682 [531]. In another series of chapters¹ we have considered what are the general doctrines governing the locality in which the suit for divorce shall be brought. There are a few special points to which it is deemed best to direct attention here. Sometimes a desertion commences in one State or country, and during its continuance one or both of the parties remove to another State; or both go, each to a different State; and then, under the peculiar statute law of some of the States, or under the peculiar view of common-law doctrine taken by some courts, it may be important, on a question of jurisdiction, to decide in what locality the desertion, as matter of law, took place. One thing is obvious on principle, that, if parties are living together in Massachusetts, and there one of them deserts the other; and, a year afterward, the desertion continuing, both go to New Hampshire, and remain in the latter State three years; a desertion for at least a period of three years has occurred in New Hampshire. Upon principle, also, there seems to be no reason why the desertion may not, under a variety of circumstances, be deemed to have taken place in either locality, as may be necessary to sustain the jurisdiction. But these questions seldom arise, and only in particular States; for, as in the proper place we have seen, it is, as a correct matter of general jurisprudence, immaterial in what locality the desertion occurred, the right to take jurisdiction over the offence depending on other principles. Still a reference to the authorities on this point may be convenient.²

¹ Ante, § 113 et seq.

² *Frary v. Frary*, 10 N. H. 61; *Brett v. Brett*, 5 Met. 233; *Harteau v. Harteau*, 14 Pick. 181; *Wells v. Thompson*, 13 Ala. 793; *Sawtell v. Sawtell*, 17 Conn. 234; *McDermott's Appeal*, 8 Watts & S. 251; *Batchelder v. Batchelder*, 14 N. H.

§ 683. Let us look a little further at the principles upon which this matter rests. In order to constitute the desertion during a specified number of years, for which the divorce from the bond of matrimony is granted, there must be the continued absence of the parties from one another, together with the intent in the mind of the defendant to desert the other. Now we saw, in the first volume,¹ that these two things need not be simultaneous in their origin; the parties may separate to-day, and the desertion begin to-morrow, or next year; wherefore, in order to constitute desertion, the separation and the intent must be matters having the same existence on the second and third and three hundredth day as on the first. As matter of evidence, where the desertion is once shown it is presumed to continue; but, as a matter of law, there is no difference between one period and another of the desertion. Thence it must follow, that, if a party goes into a State, having been deserted by the other party, the case is as favorable for the one first mentioned as if the desertion commenced in such State. Whether the prior desertion could be counted, depends on the same principle as does the question whether a prior adultery could be relied upon as ground for the divorce,— a question discussed in a previous part of this volume. The reader should remember, however, that these views point only to the matter as it rests in legal reason; how it rests in the decisions, he will see in the cases cited in the last section.

380; *Kimball v. Kimball*, 18 N. H. 222; *Masten v. Masten*, 15 N. H. 159; *Hare v. Hare*, 10 Texas, 355, 357; *Harrison v. Harrison*, 19 Ala. 499; *Bishop v. Bishop*, 6 Casey, 412; *Ashbaugh v. Ashbaugh*, 17 Ill. 476; *Payson v. Payson*, 34 N. H. 518; *Ford v. Ford*, 2 Halst. Ch. 542; *Hopkins v. Hopkins*, 35 N. H. 474; *Goodwin v. Goodwin*, 45 Maine, 377; *Yates v. Yates*, 2 Beasley, 280; *Becket v. Becket*, 17 B. Monr. 370; *McCraney v. McCraney*, 5 Iowa, 232; *Muller v. Hilton*, 13 La. An. 1.

¹ Vol. I. § 784.

CHAPTER XXXIX.

OTHER CAUSES OF DIVORCE.¹

§ 684. THERE is not, connected with the procedure, much to be said under this title. Where the statute provided for a divorce if "either party shall offer such indignities to the other as shall render his or her condition intolerable," a petition for divorce was held not to be sufficiently specific under the statute when it merely alleged, in general terms, that one party offered the other indignities which rendered the condition of such other intolerable.² The acts should be specifically set out.³

§ 685. A statute provided for a divorce "when it shall be made fully apparent that the parties cannot live in peace and happiness together, and that their welfare requires a separation." A party, proceeding under this statute, alleged, "that he and his said wife cannot live in peace and happiness together, and that their welfare requires a separation." The allegation was held not to be sufficient. Said Greene, J.: "A party seeking a divorce under this head should state something more than the conclusion sought. He should allege his foundation, make out his case, state facts and reasons sufficient to make the conclusion 'fully apparent,' to the court, that the peace, happiness, and welfare of the parties render it necessary to sever the bonds of matrimony. The petition should not only distinctly state the facts constituting the cause of divorce, but it should also show, *prima facie*, that complainant is the injured party, in order to admit proof of these essential facts before the court should decree a divorce by default."⁴

¹ For the law relating to this title, see Vol. I. § 812 et seq.

² Bowers v. Bowers, 19 Misso. 351.

³ Erwin v. Erwin, 4 Jones Eq. 82.

⁴ Pinkney v. Pinkney, 4 Greene, Iowa, 324, 326.

CHAPTER XL.

DIVORCE IN THE JUDGE'S DISCRETION.¹

§ 686. THE books are absolutely without any precedents, or any discussion, concerning the form of the pleadings relating to the divorce, when sought under statutes which authorize the judge to divorce the parties, when in his opinion the public good, or their interest, requires. Yet the matter found in our last section may furnish a hint here. It is not to be presumed that a judge would exercise this discretion except where the party had put on record, in his allegation, matter upon which the discretion could operate. The pleader, upon general principles, should be clear and full in his allegations under this head. It would be mischievous, it would be a departure from all just rules, for the court, on a mere general averment that cause for the exercise of the discretion exists, to hear evidence and pronounce a decree.

§ 687 [547]. Under this general clause, it has been held, the court may take jurisdiction over an original defect in the marriage, such as that the consent was obtained by fraud, and render a decree of nullity.²

¹ For the law relating to this title, see Vol. I. § 827 et seq.

² *Scroggins v. Scroggins*, 3 Dev. 535; *Barden v. Barden*, 3 Dev. 548; *Ritter v. Ritter*, 5 Blackf. 81; *Hamaker v. Hamaker*, 18 Ill. 137; ante, § 293.

BOOK VII.

THE CONSEQUENCES OF THE DIVORCE.

CHAPTER XLI.

CONSEQUENCES FLOWING BY LAW FROM THE VALID SENTENCE.

SECT. 688, 689. Introduction.

690-696. The Sentence of Nullity.

697-725. The Divorce from the Bond of Matrimony; as to—

697. Introduction.

698-704. The Status of the Parties.

705-725. Property Rights of the Parties and third Persons.

726-741. The Divorce from Bed and Board.

§ 688. It is not within the power of analysis so to divide any legal subject as to render the correctness of the division one of mathematical certainty; and to leave it plain to every understanding, that a different division would be legally inaccurate. In the earlier editions of this work, there were discussed under the general title of the Consequences of the Divorce, several topics, which, in this edition, have found a place elsewhere. The author was satisfied with the former division, and he is satisfied with the present one. The change has been made to serve purposes of practical convenience both to the writer and to the readers.

§ 689 [646.] The next chapter will be given to a consid-
[548]

eration of what may be termed the stability of the divorce sentence, and its binding nature, as concerns the parties and third persons. In the present chapter we are to consider, what, supposing the sentence valid, and binding on all the world, comes from it by operation of law. And though, in some portions of the foregoing pages, we have treated of the two kinds of divorce and of the sentence of nullity together, as resting on common doctrines, we shall be obliged to depart from that method here; because these three forms of adjudication produce their several distinct consequences. Let us look at, I. The Sentence of Nullity; II. The Divorce from the Bond of Matrimony; III. The Divorce from Bed and Board.

I. *The Sentence of Nullity.*

§ 690 [647]. We have seen, that, where a marriage is void, the sentence of nullity has only a declaratory force; while, where it is voidable, it is to be treated, after the sentence, as having been always void.¹ Therefore the results of the sentence, in these two circumstances, are substantially alike; though there are a few points of difference. The general doctrine is, that, after the sentence, the parties are to be regarded legally as if no marriage had ever taken place; they are single persons, if before they were single;² and their rights of property, between themselves, are to be viewed as having never been operated upon by the marriage. Thus the man can neither claim any personal estate which belonged to the woman, nor have curtesy in her lands.³ She likewise is not entitled to a share in his effects; neither is she to alimony or to dower.⁴ The children are illegitimate,

¹ Vol. I. § 105, 116, 118; ante, § 289; Gibs. Cod. 446.

² "If the wife becomes a single woman by operation of law, it is the same as if she had always remained single." *Anstey v. Manners*, Gow, 10.

³ *Aughtie v. Aughtie*, 1 Phillim. 201; *Zule v. Zule*, Saxton, 96; *Sellers v. Davis*, 4 Yerg. 503; *Cage v. Acton*, 1 Ld. Raym. 515, 521. *Calloway v. Bryan*, 6 Jones, N. C. 569. And cases cited 2 Bright Husb. & Wife, 365, note (a).

⁴ Ante, § 376; *Reeve Dom. Rel.* 209; *Co. Lit.* 32 a, 33 b; 7 Co. 140.

equally whether the marriage were voidable or void;¹ the woman, like any other *feme sole*, may sue and be sued.² Indeed, she can recover, in an action at law, her property of him who was before regarded as her husband.³

§ 691 [648]. Where the rights of third persons are concerned, the case as to them is different; particularly if the marriage was voidable, not void.⁴ And the broad doctrine has been laid down, that, while as between the woman and the man she shall have again all her property, and while as against him all claims extinguished by the marriage are revived, yet otherwise it is as against a stranger.⁵ But even as against a stranger, if the husband, by collusion with the stranger, gave or sold to him, before the sentence of nullity, the goods of the wife, she, on showing the collusion, may reclaim them.⁶ So, if without collusion the husband has aliened his wife's land, and afterward the voidable marriage is made void by a sentence of nullity, under Stat. 32 Hen. VIII., c. 28, she may enter during the life of the husband.⁷ And it is laid down in *Brook*,⁸ that things executed, where the husband is seised in right of the wife, shall not be avoided by a sentence of nullity; as waste, receipt of rent, seisin of ward, presentment to a benefice, gift of goods of the wife, &c. But that otherwise it is in matter of inheritance; as, if the husband discontinues or charges land of his wife, releases or manumits villein, &c.⁹ After a marriage has been declared void by judicial sentence, it is too late for the husband's

¹ Vol. I. § 118; *Gibs. Cod.* 446.

² *Hatchett v. Baddeley*, 2 W. Bl. 1079. See *Lean v. Schutz*, 2 W. Bl. 1195; 2 *Bright Husb. & Wife*, 366.

³ *Anonymous*, 1 Dyer, 18, pl. 61; *Lawson v. Shotwell* 27 *Mass.* 630, 637.

⁴ See post, § 695.

⁵ *Cage v. Acton*, 1 *Ld. Raym.* 515, 521.

⁶ *Br. Deraignment & Divorce*, pl. 10; 2 *Bright Husb. & Wife*, 365.

⁷ 1 *Bright Husb. & Wife*, 165; 2 *ib.* 365; *Co. Lit.* 326 a. The statute of Michigan provides, that, upon the dissolution of the marriage by divorce or sentence of nullity for any cause except the adultery of the wife, she is entitled to the immediate possession of all her real estate, in the same manner as if her husband were dead. *Johnson v. Johnson*, *Walk. Mich.* 309.

⁸ *Br. Deraignment, &c.* pl. 18.

⁹ 2 *Bright Husb. & Wife*, 364.

creditors to come in and take the wife's property for his debts, whatever they might have done before.¹

§ 692 [649]. If land is given to a husband and wife, and the heirs of their two bodies; and afterward the marriage, being voidable, is avoided by sentence; neither of them can have the estate, but they are only tenants for life, notwithstanding the inheritance once vested in them. And if, before the divorce, the parties are disseised of such land, and the husband releases to the disseisor; the woman, after the divorce, may have the moiety of it, though there were no moieties before; for the divorce converts the estate into moieties.² "It was held, that, if a lease be made to husband and wife during the coverture, and the husband sows the land, and afterwards they are divorced *causa præcontractus*, the husband shall have the emblements, and not the lessor; for, although the suit is the act of the party, yet the sentence which dissolves the marriage is the judgment of the law."³

§ 693 [850]. "In an early case," to quote from Bright on Husband and Wife,⁴ "it is laid down, that, if a man is bound to a *feme sole*, and afterwards marries her, and afterwards they are divorced, the obligation is revived.⁵ This case was cited and agreed to by Holt, C. J., in *Cage v. Acton*;⁶ because the divorce, being a *vinculo matrimonii* by reason of some prior impediment, as *præcontract*, &c., makes them never husband and wife *ab initio*. But if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance, as well as if the husband had died; because then the interest of a third person had been concerned, but between the parties themselves it will have a relation to destroy the husband's title to the goods. And it proves no more than the common

¹ Kelly v. Scott, 5 Grat. 479.

² Bright Husb. & Wife, 365, and the authorities there cited.

³ Oland's case, 5 Co. 116; 2 Bl. Com. 123. ⁴ 2 Bright Husb. & Wife, 366.

⁵ 2 Br. Coverture, pl. 82, cites 26 H. 8, 7, per Fitzherbert & Norwich.

⁶ Cage v. Acton, 1 Ld. Raym. 515, 521; but see Dyer, 140, pl. 39.

rule; namely, that relation will make a nullity between the parties themselves, but not amongst strangers."

§ 694 [651]. The doctrine is familiar, that a man is liable for the debts contracted by a woman whom he falsely holds out to be his wife, the same as though she were so in fact.¹ This doctrine would apply even to parties living in cohabitation under a void marriage. If the marriage however were voidable, whether there were a matrimonial cohabitation or not, the mere fact of its having been entered into would clearly, of itself alone, and on a different principle, render the husband liable, to the same extent as though it contained no imperfection.² Yet on its being avoided by sentence his liability ceases.³

§ 695 [652]. The propositions stated in these later sections⁴ are applicable to voidable marriages; but it is not clear the rights of third persons would be protected to the same extent, or all the other consequences would follow, where the marriage was merely void, and so the decree of nullity wrought no real change whatever in the legal condition of the parties. An infant having, in good faith, married a man who had a former wife living; and her father, ignorant likewise of the impediment, having given her a slave, — it was held, not only that the gift invested the husband with no title to the property, but further, that, though he afterward sold it with her consent, she being still in her minority, the sale conveyed no title as against her to the purchaser.⁵

§ 696 [653]. It has been held, that, if a woman marries a man who has a former wife living undivorced, and so his marriage is void, she may, upon bill in equity, compel him to account for the rents and profits of the property he took from

¹ Vol. I. § 537.

² Vol. I. § 116.

³ *Anstey v. Manners*, Gow, 10.

⁴ *Ante*, § 691-694.

⁵ *Sellers v. Davis*, 4 Yerg. 503.

her under this supposed marriage, and to redeliver the property to her with its proceeds, retaining for himself the benefit of his improvements.¹ And where a man deceives a woman into a void marriage, by falsely representing himself to be a widower, while he is not, but has a former wife living, she may also recover of him compensation for her services rendered during the cohabitation with him. The like claim, moreover, may be enforced, on the death of the man, against his estate in the hands of his legal representatives.² And in Louisiana it was decided, that a woman under these circumstances can recover of the estate of the deceased a compensation, not only for such services, but for the use of her furniture, and the hire of her negroes; together with the money he had received from her, in his lifetime, and money which, after his death, she as his executrix had paid to his creditors previous to the time when the letters were revoked on the appearance of the former wife; for "she has a right to be indemnified against the consequences of the deceit."³

II. *The Divorce from the Bond of Matrimony.*

§ 697 [654]. Where a marriage is dissolved, having been originally valid, the consequences are quite different from those which follow the annulling of a voidable marriage. On this matter, however, we have no very distinct light from the English common law; for, in England, no dissolutions of valid marriages by judicial sentence were known previous to the year 1858; and, when parliament dissolved such marriages by special act, it has been said, the consequence "does not very clearly appear."⁴ And in this country, the statutes of some of the States fully regulate the matter; whence it has arisen, that our decisions do not perhaps quite cover the

¹ *Young v. Naylor*, 1 Hill Eq. 383; ante, § 291.

² *Higgins v. Breen*, 9 Miss. 497.

Fox v. Dawson's Curator, 8 Mart. La. 94. . . ⁴ 2 Bright Husb. & Wife, 366.

whole ground. Let us look at the matter as concerns, First, The status of the parties; Secondly, Property rights of the parties and third persons.

§ 698 [655]. First. *The Status of the Parties.* The approved doctrine is, that a divorce from the bond of matrimony places both the parties, the innocent and the guilty, in the condition of single persons. This indeed has never been questioned, except where some provision in the act or decree, or the general law, has been supposed to work a different result; but the doubt, to any extent, is clearly without support, either in principle or any sufficient authority. "Parliamentary bills of divorce," says Shelford, "usually declare, that the bond of matrimony between the parties shall be wholly dissolved, annulled, vacated, and made void to all intents and purposes whatsoever. But express authority to contract a new marriage is given only to the injured party; making it lawful for such party to marry again, and declaring that the children born in such matrimony shall be legitimate. There is no similar provision for the future marriage of the offending party. It seems more than probable, that, in the early instances of these divorces, it was not supposed or adverted to, that the permission to contract a new marriage could extend to the adulteress. But the subsequent and long acquiescence seems to have established such marriages, or at least entitled them to be established, if any doubt should arise respecting their validity. It is indeed difficult to understand, how a marriage can be dissolved as to one of the parties, without being equally dissolved as to the other. And perhaps it may be concluded, that divorce bills, as now worded, though purporting only to relieve the injured party, are a complete dissolution of the marriage; of which dissolution the adulteress may legally avail herself, unless expressly prohibited by the same act of the legislature. This point was much discussed in the House of Lords in the year 1800; and, although the preponderating opinion seemed to be in favor of the validity of the marriage between

the guilty parties, yet some of the speakers entertained doubts."¹

§ 699 [656]. But let us here proceed less rapidly over the ground than we have done in some other parts of these volumes, and so examine in detail the reasons on which the doctrines we are considering rest. In some of the States, the statute declares, that the decree shall dissolve the marriage only as to the innocent party; and then the difficulty is, whether the other can marry again either in the State where the divorce is granted, or elsewhere. In many of the States, the same general law which authorizes the divorce, forbids the guilty party to contract a second marriage; and upon this comes the doubt, whether he may marry in any other State or country. And in respect to the various forms of statutory enactment, we have the query, whether, if the guilty party does marry, he is subject criminally, even in the State which pronounced the divorce, to punishment under the laws against polygamy; and the still further query, whether, notwithstanding the prohibition, the second marriage, even celebrated in his own State, is not valid.²

§ 700 [657]. Some of these questions have passed to judicial determination. And thereby the doctrine has become established, that any divorce which releases one party from the marriage necessarily frees the other also, whatever be the terms of it, or of the legislative act under which it is granted; because there cannot be a husband without a wife, a wife without a husband. If, for example, the statute prohibits the party in fault from contracting a second marriage, and nevertheless he contracts one, he may be punished criminally under the particular provision, but not punished under a provision against either polygamy or adultery.³ In refusing to hold a defendant, in these circumstances, to be guilty of

¹ *Shelford Mar. & Div.* 476.

² See, as to this matter, Vol. I. § 304-307.

³ *Commonwealth v. Putnam*, 1 Pick. 136; *People v. Hovey*, 5 Barb. 117. And see *Dickson v. Dickson*, 1 Yerg. 110, 115; *Calloway v. Bryan*, 6 Jones, N. C. 569; Vol. I. § 149, 151, 304-307, 355, 374.

polygamy, the Supreme Court in one of the districts of New York, by Selden, J., observed: "The terms husband and wife have a very definite and precise meaning. They are descriptive of persons who are connected together by the marriage tie, and are significant of those mutual rights and obligations which flow from the marriage contract. Until those obligations are assumed, there is no *wife*; and the term is then applied, not merely to describe a woman who has been married, but as expressive of the relation existing between her and her husband. So long as that relation continues, she is properly a wife; when that ceases, the term is no longer applicable. The decree dissolves the marriage, and declares that each party is freed from its obligations. The marriage contract, therefore, is at an end; not only the complainant in the chancery suit [for divorce], but the defendant also, is absolved from all the obligations arising out of *that contract*. The relation of the parties, consisting of their mutual rights and duties, no longer exists; and it would seem to follow, that the words husband and wife, used to describe that relation, have ceased to be applicable. Certainly the former *wife*, as to whom the dissolution of the marriage is entirely unlimited, cannot be said, after this decree, to have a husband living; for she might marry again, and thus, if that were so, have two lawful husbands at the same time. But husband and wife are correlative terms, so defined by lexicographers; which implies, that, whenever one can be properly applied, there must be a person to whom the corresponding term is applicable. If therefore the defendant is no longer the *husband* of his former wife, then she is no longer his *wife*. It was urged in the argument, that, while the dissolution of the marriage by the decree was total and absolute on the part of the complainant, it was only partial as to the defendant, who remained subject to a portion of the restraints arising from the marriage contract. In answer to this it may be said, that the obligations of the marriage relation are mutual; and the abrogation of them on one side necessarily involves their annihilation on the other; and accordingly the decree itself provides, that *each party* is freed

from those obligations. The restraint of the defendant, as to a second marriage, arises, not out of the marriage contract, or from any continuing obligations to his former wife, but exclusively from the positive prohibition of the statute."¹

§ 701 [658]. The same general question came before the Supreme Court of Tennessee under a different aspect. The Kentucky statute of 1808, c. 31, relating to divorces, provided, that the final decree "shall not operate so as to release the offending party, who shall nevertheless remain subject to all the pains and penalties which the law prescribes against a marriage while a former husband or wife is living;"² and a woman, divorced in Kentucky for her fault, removed to Tennessee, and there married. The Tennessee court held this marriage to be good. Caton, J., delivering the opinion, observed: "I have with much perseverance examined and endeavored to find some legal principle that would avoid the marriage between the petitioner [the wife] and John Dickson [the second husband]; but, to my great regret, I have not been able to find any such principle. I will therefore briefly state what I have found the law clearly to be, and leave to the legislature to do that which this court has not the power to do. Mary May [the petitioner] was legally divorced from her husband, Benjamin May, by the Union Circuit Court of Kentucky, being a court of competent jurisdiction over the subject-matter and the parties; the decree dissolving the marriage is conclusive on all the world."³ The

¹ *People v. Hovey*, 5 Barb. 117. The statute of bigamy in New York provides, that it shall not extend "to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court, for some cause other than the adultery of such person." And it is held to be no defence to an indictment for polygamy, that, subsequently to the second marriage, the first has been so dissolved for a cause other than the defendant's adultery, though the cause occurred prior to the second marriage. But if the decree of divorce had been previously rendered, it would be otherwise. *Baker v. People*, 2 Hill, N. Y. 525.

² See *Cox v. Combe*, 2 B. Monr. 231.

³ *Roach v. Gravan*, 1 Ves. sen. 157; *Burrows v. Jemino*, 2 Stra. 733; *Rex v. Roche*, 1 Leach, 4th ed. 134; *Mills v. Duryee*, 7 Cranch, 481; *Grant v. Swift*, 4 Johns. 84.

statute of Kentucky provides, that the offending party (the petitioner in this case) shall not be released from the marriage contract, but shall be subject to all the pains and penalties of bigamy. It is impossible in the nature of things, that all the relations of wife shall exist when she has no husband; who, as soon as the decree dissolving the marriage was pronounced, was an unmarried and single man, freed from all connections and relations to his former wife; and equally so was the petitioner freed from all marriage ties and relations to Benjamin May, in reference to whom she stood like unto every man in the community. Therefore *he* has no right to complain of the second marriage; who has? Not the Commonwealth of Kentucky, whose penal laws cannot extend beyond her own territorial jurisdiction, and cannot be executed or noticed in this State, where the second marriage took place, and the violation of said laws was effected.¹ Had Mary May married a second time in Kentucky, such marriage would not be void because she continued the wife of Benjamin May, but because such second marriage in that State would have been in violation of a highly penal law against bigamy; it being a well-settled principle of law, that any contract which violates the penal laws of the country where made shall be void. The inquiry with this court is not, however, and cannot be, whether the laws of Kentucky have been violated by this second marriage, but, have our own laws been violated? The act of 1820, c. 18, against bigamy, declares it felony for any person to marry having a former husband or wife living. Mary May had no husband living, and is not guilty of bigamy by our statute; nor has she violated the sanction of any penal law of this State. No principle of comity amongst neighboring communities can be extended to give force and effect to the penal laws of the one society ex-territorially of the other; and, for many reasons, it would be equally inconvenient, not to say impracticable,

¹ *Folliott v. Ogden*, 1 H. Bl. 123, 135; *Houston v. Moore*, 5 Wheat. 1, 69; *Commonwealth v. Green*, 17 Mass. 515, 540; *Scoville v. Canfield*, 14 Johns. 338; *United States v. Lathorp*, 17 Johns. 4.

to adopt the principle among sister States of the American Union; for which this court has the conclusive authority of the Supreme Court of the United States, in *Houston v. Moore*, 5 Wheaton, 68." And the court, besides affirming the validity of the second marriage, further held, that, though the Tennessee act of 1820, c. 18, against polygamy, made it felony for any person to marry having a former husband or wife living, yet this woman, divorced in Kentucky, had not, within the act, a former husband living, neither had she violated any law of Tennessee.¹

§ 702 [659]. Likewise a statute, which, in general terms, prohibits the guilty party after a divorce from marrying again, does not apply to one divorced in another State or country. For, observed Parker, C. J., "the criminal laws of a State do not; *ex vigore suo*, have force beyond the territory of the State which enacts them."² Indeed it is difficult to find any principle whereon a State could properly inflict either this or any other penalty on one domiciled within its borders, in pursuance merely of what had before transpired in another country, in which he was then resident. To do this would be giving a force to foreign laws and adjudications quite beyond any ordinary examples either of legislative or judicial determination. And so in some late cases it has been adjudged.³

¹ *Dickson v. Dickson*, 1 Yerg. 110. And see ante, § 700; *Putnam v. Putnam*, 8 Pick. 433; *Cambridge v. Lexington*, 1 Pick. 506; *Ponsford v. Johnson*, 2 Blatch. 51. But see dicta in *Williams v. Oates*, 5 Ire. 535, and *Mansfield v. McIntyre*, 10 Ohio, 27.

² *Cambridge v. Lexington*, 1 Pick. 506, 510. "The statutory declaration, that the delinquent party shall never marry again without incurring the penalties denounced for bigamous connections, could not have been intended to apply to husbands who had never been either citizens or domiciled residents of Kentucky." *Maguire v. Maguire*, 7 Dana, 181, 187. And see *Commonwealth v. Hunt*, 4 Cush. 49; *Dickson v. Dickson*, 1 Yerg. 110; *Commonwealth v. Green*, 17 Mass. 515; 1 Greenl. Ev. § 376; *Morgan v. Pettit*, 3 Scam. 529.

³ *Clark v. Clark*, 8 Cush. 385; *Ponsford v. Johnson*, 2 Blatch. 51. In Mississippi, the statute expressly gives the guilty party, in all cases after divorce, the right to marry. *Powell v. Powell*, 27 Miss. 783. A statute prescribing a higher punishment for a second offence against the criminal law than the first, is construed

§ 703 [659 a]. There is a New York case, in which, under the statute of New York, the contrary has been laid down by way of *dictum*, but not decided. The statute provides, that "no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife of such person, unless the marriage with such former husband or wife shall have been annulled or dissolved for some cause other than the adultery of such person." And Johnson, J., sitting in the Court of Appeals, said of this statute: "Its subject-matter is the prohibition of marriages within this State, to certain persons who come within its terms. It covers the case of one married abroad and divorced abroad for his own adultery, just as plainly as it does the case of a marriage and divorce for the same cause here."¹ We may however observe, that the construction thus intimated is contrary to the doctrine laid down in Tennessee, as before stated;² contrary, also, to sound canons of interpretation. Let us test this matter by a few suggestions. For the divorce, pronounced in a foreign jurisdiction, to be recognized as valid in New York, one or both of the parties must have been domiciled at the time of the divorce in the foreign country. Suppose, in the first place, both of the parties had then the foreign domicil. When the divorced one goes into New York, how do the courts of New York know such one to be married? They can only inquire, whether the person was a married person in the foreign country, at the time of coming to New York. If they so inquire, they learn, that in such foreign country no marriage then subsisted; but,—Has not the person a "*former* husband or wife" living? The international law knows no such relation as that of *unmarried* persons to *former* matrimonial partners. If the New York law does, then it must be construed, according to all sound doctrine, as referring only to what has been done in New York, not to what has been done in the foreign country.

to require the first offence to have been committed in the country wherein the statute has effect. *People v. Caesar*, 1 Parker, 645.

¹ *Cropsey v. Ogden*, 1 Kernan, 228, 235, 236.

² Ante, § 701.

Secondly; suppose, that, at the time of the divorce, only the complainant was domiciled abroad, while the guilty one was domiciled in New York, the New York courts would then, anterior to the divorce, have held such guilty one (assuming her to be the wife) to be sustaining the status of a married woman. After the divorce, they would hold her to be unmarried, not on account of any direct operation in New York of the decree of divorce rendered in a foreign jurisdiction against a citizen of New York, but simply because then she would have no husband; and a wife without a husband is a contradiction in terms. Would she have a *former* husband? Plainly not; because the person once her husband was only such to her in New York by force of the international law, not by force of the New York law. And no New York statute should be construed to repeal or change international law. When the statute creates the relation (if indeed it does) of *an unmarried woman to a former husband*, it must be construed as purely a domestic affair; the husband must have been one under the New York law, not one under the international law. But in truth, the words of this statute should not be construed to create an anomalous domestic relation; and, not being so construed, should be deemed simply to prohibit the marriage of the guilty party after a New York divorce, not to refer to what the New York courts cannot take cognizance of, namely, the innocence or guilt of persons under foreign jurisdictions.

§ 704 [659 b]. A query has been already raised in these volumes,¹ whether all prohibitions of second marriage to the divorced party should not be construed as operating merely by way of penalty, not as rendering the marriage void, unless express words of nullity are employed. And there are strong reasons for holding this to be their effect.²

¹ Vol. I. § 306.

² See, however, as adverse to this intimation, *Calloway v. Bryan*, 6 Jones, N. C. 569, which compare with *Williams v. Oates*, 5 Iro. 535, and *Park v. Barron*, 20 Ga. 702; ante, § 701, which also compare with Vol. I. § 283, 286, 287.

§ 705 [660]. Secondly. *Property Rights of the Parties and third Persons.* Coming now to consider the effect of the dissolution of a valid marriage upon these rights, we must remember, that the decree of divorce, so far from undoing the original marriage, expressly affirms it;¹ and therefore does not restore the parties to their former condition, but places them in a new one. Consequently all transfers of property which were actually executed, either in law or fact, abide; for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce, the same as before.² But we shall see, in subsequent sections, that this divorce puts an end to all rights depending upon the marriage, and *not actually vested*; as dower in the wife, curtesy in the husband, and his right to reduce to possession her choses in action. When, after this divorce, the man dies, the woman is not his widow, therefore no rights which the law gives to widows are hers.³

§ 706 [661]. *Dower.* Of dower, Lord Coke says: "Concerning the seisin, it is not necessary that the same should continue during coverture; for, albeit the husband aliens the lands or tenements, or extinguishes the rents or commons, &c., yet the woman shall be endowed. But it is necessary that the marriage do continue; for, if that be dissolved, the dower ceases, *ubi nullum matrimonium, ibi nulla dos.*"⁴ It is noticeable, however, that he is here speaking of the effect of a decree annulling a voidable marriage; while possibly we are not to look to the English jurisprudence for authorities concerning the consequences of the dissolution of marriage for causes arising subsequently to its celebration. Still the same doctrine is considered applicable in the latter circumstances; and so the common law of this country is clearly established, that no woman can have dower in her husband's lands, unless the coverture were continuing at the time of his death. The reason appears to be, that, as the English

¹ Ante, § 262.

² *Lawson v. Shotwell*, 27 Missis. 630, 636.

³ *Dobson v. Butler*, 17 Misso. 87.

⁴ Co. Lit. 32 a.

common law never recognized any right of dower unless the woman were covert when the husband died, our courts cannot create such a right in her by construction, merely because, in consequence of a legislative enactment, she is found in circumstances unknown to the common law.¹ And this result is in harmony with the universal doctrine, that the divorce we are considering puts an end to all rights (as the husband's to the wife's choses in action and to curtesy) resting on the marriage, and not actually vested.²

§ 707 [662]. It is a little remarkable, however, that, when this question of dower arose in New York, after having been decided in the way just mentioned in several of the States, with entire unanimity of judicial opinion, it travelled through the Supreme Court, where it was passed upon by a divided bench, into the Court of Appeals, without any reference being made, in either of these courts, by the counsel or by any of the judges, to any one of the prior American direct adjudications, or to any of the numerous illustrative decisions, respecting the husband's rights to the wife's choses in action, and to curtesy. "The question," said the judge who pronounced the opinion in the latter tribunal, "is entirely new." In the Supreme Court, the majority of the bench sustained what we have seen to be the general doctrine; while, in the Court of Appeals, a contrary judgment was rendered, the woman being considered entitled to her dower.³

¹ *Given v. Marr*, 27 Maine, 212; *McCafferty v. McCafferty*, 8 Blackf. 218; *Clark v. Clark*, 6 Watts & S. 85, 88; 4 Kent Com. 53, note, 54; *Levins v. Sleator*, 2 Greene, Iowa, 604; *Cunningham v. Cunningham*, 2 Ind. 233; *Whitsell v. Mills*, 6 Ind. 229; *Miltimore v. Miltimore*, 4 Wright, Pa. 151; *Burdick v. Briggs*, 11 Wis. 126; *Rice v. Lumley*, 10 Ohio State, 596; *McCraney v. McCraney*, 5 Iowa, 232.

² Ante, § 705; post § 712, 714.

³ *Wait v. Wait*, 4 Barb. 192, 4 Comst. 95. In the New York case of *Charrnaud v. Charrnaud*, 1 N. Y. Leg. Obs. 134, not referred to in *Wait v. Wait*, it was laid down, — and on this the case proceeded, — that the wife cannot have dower unless the marriage were "subsisting at the death of the husband." See also, as recognizing the doctrine of *Wait v. Wait*, *Forrest v. Forrest*, 6 Duer, 102, 153; but, in this latter case, the doctrine seems to be placed, not so much on general principles, as on the peculiar phraseology of the New York statute.

It had been held however in Ohio, that a divorce decreed on the prayer of the husband in a foreign State, while the wife was an inhabitant of Ohio, did not take away her right of dower in her own State.¹

§ 708 [662 a]. That the wife cannot have dower unless she is wife when the man who was her husband dies, appears, moreover, from the consideration, that, during the coverture, the law recognizes no interest vested in her, under the name of dower or otherwise, in her husband's real estate.² She has only the possibility of an interest, on surviving him; but there can be no survivorship without death, and the death of a man not her husband cannot make her a survivor to give dower.

§ 709 [663]. But in many or most of the United States it is provided by statute, that, when the wife is the innocent party, she shall be entitled, immediately on the divorce, to dower in the lands of the husband, in like manner as if he were dead. In such cases, the dower is not to be set off to her in the divorce suit, but she is to recover it by the same process she would if he had died.³ Her right extends as well to lands aliened during the coverture, as to those whereof he was seised when the dissolution of the marriage took place.⁴ This provision is contained in the statutes of Indiana; and there, a decree of divorce having been rendered with the following remarkable and novel clause in it: "The court being satisfied by the evidence, that the complainant and defendant are both guilty of misconduct towards each other, it is therefore ordered, adjudged, and decreed, that . . . this divorce is not granted upon the misconduct of the said defendant alone, but *upon the misconduct of both the parties*,"—the wife was held not entitled to dower under the statute.⁵

¹ *Mansfield v. McIntyre*, 10 Ohio, 27.

² *Barbour v. Barbour*, 46 Maine, 9.

³ *Smith v. Smith*, 13 Mass. 281.

⁴ *Davol v. Howland*, 14 Mass. 219; *Harding v. Alden*, 9 Greenl. 140.

⁵ *Cunningham v. Cunningham*, 2 Ind. 233.

§ 710 [664]. Yet a wife cannot have dower in lands her husband had aliened before the enactment of the statute creating this peculiar kind of dower, though the statute were in force at the time of the divorce. It will not be construed as intended to apply to such lands; or, if so intended, it will be adjudged unconstitutional as divesting vested rights. The purchaser of the land bought it with such an incumbrance of dower as the law, existing at the time of the purchase, put upon it; and the legislature cannot, by a new act, enlarge the incumbrance.¹ It should be borne in mind, that, in respect to dower under these circumstances, the legislative enactment creates a right which, without it, does not exist. But the same rule does not apply where the right rests on the marriage itself; for there it must end, even as against third persons, whenever and however the marriage is dissolved. For example, the interest of the husband in the real estate of the wife, having no other foundation than the coverture, fails with it; and the estate must revert to her, though the divorce is by special legislative act, for a cause unknown to the general law.²

§ 711 [665]. Where the words of the statute were, that, on the dissolution of the marriage by divorce for the adultery of the husband, the wife should have "her dower, to be assigned to her in the lands of her husband, in the same manner as if such husband was naturally dead," — it was decided, that this provision applies to a case, where neither the husband nor the wife is an inhabitant of the State; where the divorce was decreed by the courts of another State, in which the wife was resident, but in which the husband had never resided; and to lands which were aliened before the divorce.³

¹ *McCafferty v. McCafferty*, 8 Blackf. 218; *Given v. Marr*, 27 Maine, 212; *Comly v. Strader, Smith*, Ind. 75, 1 Ind. 134. If the statute were in force at the time of the alienation, as well as before the divorce, it would be otherwise; post, § 711. See also *Whitsell v. Mills*, 6 Ind. 229.

² *Townsend v. Griffin*, 4 Harring. Del. 440; *Starr v. Pease*, 8 Conn. 541; *Wright v. Wright*, 2 Md. 429. And see post, § 714.

³ *Harding v. Alden*, 9 Greenl. 140. But see the observations of the court in *Mansfield v. McIntyre*, 10 Ohio, 27.

In such a case, if the lands were aliened before the enactment of the statute, the doctrine of the last section would control, and produce a different result.

§ 712 [666]. *Curtesy*. The same common-law doctrine which we have been considering, in its application to dower, applies also to the interest which the husband acquires by the marriage, in the real estate of the wife. Upon a divorce for causes arising subsequently to its celebration, equally as upon a sentence of nullity, all the husband's claim to the lands of his wife ceases; and she is entitled to recover immediate possession of them, not only as against him, but also as against his grantee, if he has aliened them. The principle is, that the marriage constitutes him tenant in her right of all her freehold property, during the coverture, but no longer. Upon the birth of living issue capable of taking her estate of inheritance by heirship, he becomes tenant by the curtesy *initiate* of it; but the death of the wife is necessary to make such tenancy *consummate*; and there can be no death of the wife if the woman ceases to be a wife before her death.¹ The divorce has the effect thus mentioned, not only upon the wife's estates of inheritance, but also upon her freehold interests; such, for instance, as lands which she holds in dower by reason of a former marriage.² Yet she cannot, after the divorce, maintain the particular form of action called trespass, against the husband's grantee;³ and, the termination of the coverture being the act of the law, the lessee of the husband is entitled to the emblements.⁴

§ 713 [667]. It has been decided in Delaware, that a legis-

¹ *Wheeler v. Hotchkiss*, 10 Conn. 225; *Starr v. Pease*, 8 Conn. 541; *Barber v. Root*, 10 Mass. 260; *Renwick v. Renwick*, 10 Paige, 420, 424; *Doe v. Brown*, 5 Blackf. 309; *Mattocks v. Stearns*, 9 Vt. 326; *Burt v. Hurlburt*, 16 Vt. 292; *Sackett v. Giles*, 3 Barb. Ch. 204; *Oldham v. Henderson*, 5 Dana, 254; *Townsend v. Griffin*, 4 Harring. Del. 440; *Boykin v. Rain*, 28 Ala. 332; ante, § 710.

² *Gould v. Webster*, 1 Tyler, 409.

³ *Wheeler v. Hotchkiss*, 10 Conn. 225.

⁴ *Gould v. Webster*, 1 Tyler, 409; *Oldham v. Henderson*, 5 Dana, 254; ante, § 692.

lative divorce from the bond of matrimony, in terms restoring to the wife all her lands, has the effect to divest judgment liens created by the husband, and annul sales made under these liens. The court put the decision as much on the necessary operation of the divorce itself, as on the phraseology of the act granting it. Said the judge: "The right of curtesy is a right appertaining to a *husband*, or one who was such at the wife's death. This right does not become perfect until issue born and the death of the wife, and can never be perfected if the relation of husband and wife be destroyed before the wife's death. With the destruction of that relation, all its rights and obligations cease, of course; and the right of the husband's creditors cannot exceed his right. The lien of the judgment in this case, upon the husband's interest as tenant by the curtesy initiate in the wife's lands, was a right of the creditor vested no further than as subject to all the legal incidents of the relation of husband and wife; uncertain in its character, and liable to be divested in any way in which the relation can be destroyed before the husband's tenancy by the curtesy became absolute."¹ Substantially the same view has been taken of the matter in Connecticut;² and it seems to result equally well from principle³ as from authority.

§ 714 [668] *Choses in action*. The same general doctrine now being considered applies to the wife's choses in action. While the marital relation exists, the husband may reduce them to possession, but he cannot do so after it has ended. His right to use his wife's name, in a suit to recover them, rests solely upon the coverture, and ends with it as well when it is terminated by divorce as by death.⁴ And if, after a

¹ *Townsend v. Griffin*, 4 Harring. Del. 440, 442.

² *Starr v. Pease*, 8 Conn. 541.

³ See Vol. I. § 692; ante, § 705, 706, 708; post, § 714.

⁴ *Renwick v. Renwick*, 10 Paige, 420, 424; *Browning v. Headley*, 2 Rob. Va. 340; *Legg v. Legg*, 8 Mass. 99; *Fink v. Hake*, 6 Watts, 131; *Lodge v. Hamilton*, 2 S. & R. 491; *Wintercast v. Smith*, 4 Rawle, 177. See also *Clarke v. McCreary*, 12 Sm. & M. 347; *Price v. Sessions*, 3 How. U. S. 624; *Holmes v.*

divorce has extinguished this right, the husband receives money on any thing due to her in action, she may recover it of him, in a suit for money had and received.¹ The doctrine is, that the divorce places her in the same situation in respect to this species of property, as if he were dead: and hence, when a legacy for the wife came into the hands of the husband as executor and trustee; and she afterward, on her petition, obtained a divorce from the bond of matrimony; the court held, that he had not, in contemplation of law, reduced it into possession, and that so she was entitled to it as against him.²

§ 715 [669]. How far, on the decease of the husband, his assignee of the wife's choses in action can claim them as against her, appears not to be entirely settled upon authority.³ But her rights, whatever they may be, are the same upon a divorce as upon the husband's death.⁴ Assuming that the assignee for a valuable consideration is protected as against her,⁵ still the mere creditor is not; and such creditor cannot set off against her sole suit a debt which the husband had contracted.⁶ Thus, those who administer on the estate of a divorced wife's deceased father cannot diminish her claim for her share in the estate, by showing a loan made by the father to the husband during the cohabitation. But they can set up, in diminution of it, an advance so made by the father to

Holmes, 4 Barb. 295; White v. White, 5 Barb. 474; Wood v. Simmons, 20 Misso. 363.

¹ Legg v. Legg, 8 Mass. 99.

² Kintzinger's Estate, 2 Ashm. 455.

³ 2 Kent Com. 136 et seq. See post, § 735.

⁴ Ante, § 714.

⁵ Where a husband assigned his wife's chose in action, without consideration; and the assignee assigned it for good consideration, to another who had no knowledge of the facts concerning the first assignment; and thereupon the wife obtained a divorce *a vinculo*, and this second assignee received afterward the money in payment of this chose in action; it was held, she could not recover the money back. McConnell v. Wenrich, 4 Harris, Pa. 365. But other authorities do not place the assignee in any better condition than the husband. Such was the doctrine established in a late Missouri case, very fully considered. Wood v. Simmons, 20 Misso. 363. See post, § 735.

⁶ Fink v. Hake, 6 Watts, 131. And see Lodge v. Hamilton, 2 S. & R. 491.

him on her account.¹ And in respect to the assignee of the husband, even supposing him to be protected in his assignment, still his right can never exceed the assignor's, which is, not absolutely to recover the chose in action, but to recover it subject to her claim for an equitable provision out of it. In determining the amount of such provision, the ill-conduct of the husband, on which the divorce was founded, may be taken into the account; and, in a case wherein, besides such ill-conduct, it appeared, that, before the assignment of the particular chose in action in controversy, he had received and squandered much of her fortune, the court allowed her the whole.²

§ 716 [669 a]. *Lands conveyed to Husband and Wife.* It is familiar to the legal profession, that, if during coverture married parties receive a deed of land running to the two jointly, a peculiar estate is created, in consequence of which the survivor will take the whole, though the other had aliened of it whatever he could alien. There is a late Tennessee case wherein it appeared, that, after husband and wife had become so seised of real estate, it was levied upon under execution and sold, for the husband's debts; and then the wife obtained a divorce *a vinculo* from him, for his fault; and the court held, that the purchaser was entitled to retain the land until the death of the husband, and forever, unless, after the husband's death, she should be living, when it would become hers absolutely. The decision proceeded upon common-law principles, but the court supposed the exact question had never before been adjudicated.³ If the author's views of this point be deemed worthy of examination, they are here given, as follows: The purchaser under the execution could stand in no better situation toward the wife, in respect of this land, than the husband stood; because the well-established doctrine, that, were the husband to sell such an estate, and then

¹ *Hake v. Fink*, 9 Watts, 336.

² *Browning v. Headley*, 2 Rob. Va. 340. See *Page v. Estes*, 19 Pick. 269; post, § 733.

³ *Ames v. Norman*, 4 Sneed, 633.

die, it would immediately become absolutely the wife's, shows this estate to be one in which no third person can stand superior to the husband. But could the husband thus hold the estate, after the divorce, if it were not sold, to the exclusion of the wife? If he could, then he would have in it a superior right to hers; but the settled law of such an estate is, that here husband and wife are equal. She, on the other hand also, could not hold it exclusively as against him. Moreover, it could not revert to the grantor; because all the interest of the grantor had gone out of himself, and the operation of the divorce did not, like a sentence annulling a voidable marriage, extend back beyond the time it was pronounced; it did not send its influence so far back as to affect the grantor's deed. The result is, that two persons, a man and a woman, once married, but not married now, have together the entire fee of the estate, neither one having a claim superior to the other. While they were in law one person, their interest in the estate was indivisible; but the law has come and severed their unity of person, so also has it severed, in the same way, their unity of estate, making them tenants in common.

§ 717 [670.] *Marriage Settlements, &c.* From the proposition, that the divorce we are considering divests each party of those executory property rights which have no basis but the coverture, such as curtesy, dower, and the husband's claim to the wife's choses in action, while it has no operation upon vested interests,¹ it follows, that property settled upon the husband or wife, or held by third persons for the benefit of either, remains usually after the divorce the same as before.² And it is immaterial in respect of this question, as it is in respect of the questions already discussed, for what cause the marriage was dissolved, or which party was the guilty one. Thus, where, pursuant to an antenuptial agreement,

¹ *Ante*, § 705-715.

² *Buffaloe v. Whitdear*, 3 Harris, Pa. 182; *Dalton v. Bernardston*, 9 Mass. 201; *West Cambridge v. Lexington*, 1 Pick. 506.

husband and wife had conveyed her real estate to a trustee, to be held for her benefit during her life, with a life interest in the husband if he should survive her, and then to the heirs of the wife on the decease of both, making him thus substantially tenant by the curtesy,—it was decided, that he lost no rights under this settlement by a divorce for his fault from the bond of matrimony; and that so he would still be entitled, surviving her, to the use of this property during his life.¹ In like manner, where a husband and wife entered into an agreement, through a trustee, intended to secure her a separate maintenance; the husband covenanting with the trustee, who undertook to be responsible for any debts of her contracting, that he would pay him for her use a certain sum, in regular instalments, “as alimony for and during the term of her natural life;” it was held, that a subsequent divorce—the record does not show for whose fault decreed—followed by a marriage of the wife, did not discharge the former husband from his liability to maintain her under his covenants.² This doctrine was in a New York case questioned by Assistant V. C. Hoffman, who laid down the proposition, “that a decree for a divorce *a vinculo matrimonii*, for the crime of the wife, annuls every provision made for a wife in marriage articles, or a marriage settlement in the nature of jointure, or otherwise, as well as any provision in articles executed upon a separation.” But in the case before him he sustained the claim of the woman; it appearing, that, during the coverture, the husband, knowing she was guilty of adultery, had entered into articles of separation, and covenanted to pay her an annuity; the payment of which annuity he had actually continued for three years after the divorce, and had then made

¹ Babcock v. Smith, 22 Pick. 61.

² Blaker v. Cooper, 7 S. & R. 500; s. p. where the wife was the party delinquent, Miller v. Miller, 1 Sandf. Ch. 103. And see Heaviside v. Lardner, 3 Law Reporter, 201, 218, Aug. 1840, before Baron Gurney; Jee v. Thurlow, 4 D. & R. 11; McGowan v. Caldwell, 1 Cranch C. C. 481, where a divorce *a vinculo*, in which it was declared in the decree that articles previously entered into for alimony should remain in full force, was held to be no bar to an action on a bond given to secure the performance of those articles.

a new agreement directly with her, secured by mortgage of his real estate,—to foreclose which mortgage she, after contracting a second marriage, brought her bill.¹

§ 718 [671]. Where a testator directed an annuity to be paid to his *nephew Thomas Bullock and Rebecca his wife, and their children*; and, after he had died, the marriage between Thomas and Rebecca was dissolved, but the trustees, Thomas being alive, refused to pay over any portion of the annuity to her; it was held, on demurrer to her bill brought to enforce the payment of such portion as the court should order, that she was entitled to the relief prayed. She being personally named in the bequest, the word “wife” must be understood as descriptive of the person, not of the character in which she was to take. It does not appear what proportion of the annuity the court finally awarded her.²

§ 719 [672]. But it would seem,—though we have little light on this point,—that, when a court of equity is called upon to exercise a discretionary power, as to decree the specific performance of a contract,³ it will, if justice requires, refuse, after the marriage is dissolved, to give effect to a mere agreement for a settlement. Thus, where, before the nuptials, there had been a contract between the parties and trustees, in which the intended husband undertook, that, after the nuptials, he would convey to the trustees certain property, to be held in trust to pay the dividends and profits to himself during his natural life; and, in case of his death, “leaving the said Mary,” the intended wife, then to pay the same to her, with certain limitations over; and, before he had executed the conveyance, there was a divorce on his prayer for her fault, and, after this, he died,—it was held, that a suit in equity for her benefit could not be maintained, to enforce the

¹ *Charruand v. Charruand*, 1 N. Y. Leg. Obs. 134. See also *Hastings v. Orde*, 11 Sim. 205.

² *Bullock v. Zillgy, Saxton*, 489.

³ And see in regard to this distinction, *Charruand v. Charruand*, 1 N. Y. Leg. Obs. 134. And see post, § 741.

specific performance of the agreement. "The marriage," said the court, "is dissolved; and all rights and obligations dependent on the existence of the marriage relation are extinguished. The parties are no longer husband and wife, but are permitted to marry at pleasure. The husband is released from all obligation to maintain the wife, and his right to her separate property is at an end. The rights of the wife, to his estate, and to receive a support from it, further than they are saved by the statute or allowed by the court in the way of alimony, are determined. It follows, that this suit cannot be maintained. The sole object of the agreement, so far as the wife was concerned, was to provide her a support as the widow of Somerville [the husband]. Before any estate vested in the trustees, the marriage was dissolved, for her misconduct, and she ceased to be his wife. He was no longer legally or morally bound to support her, or to carry into effect any provision previously intended for that purpose. His duty to support her was extinguished by the dissolution of the marriage, and with it fell her right to demand the execution of the trust. It is only in the capacity of wife, or widow, that she can compel the performance of the agreement. This must be the basis of her right to relief. She stands in neither relation. Ceasing to be the wife of Somerville when living, she could not become his widow by surviving him. If the estate had been conveyed to the trustee in pursuance of the agreement, it is possible that her right to receive the income would not be lost by the divorce; but, upon this question, we express no opinion."¹

§ 720 [672 a]. There is some difficulty in laying down, even when we make the attempt unfettered by precedent, precise rules concerning the operation of settlements, agreements for settlement, agreements for separate maintenance, and the like, after a divorce has dissolved the marriage. But suppose there is a mere executory agreement to pay money,

¹ *Clarke v. Lott*, 11 Ill. 105. And see *Cartwright v. Cartwright*, 19 Eng. L. & Eq. 46.

to transfer property, and so on, while what is so agreed remains undone; and suppose the consideration for the agreement to be the marriage, or the obligations which grow out of the marriage, — here, if the marriage is dissolved, the consideration, which is the life and the soul of the agreement, is taken out of it, and nothing remains therefore to be enforced.

§ 721 [672 *b*]. Suppose again the application is made to a court of equity to enforce the specific performance of a contract of the kind under consideration, and nothing appears in the case, such as is mentioned in the last section, showing the contract to have become void in law, still the court of equity, acting on the familiar rule that he who would have equity must do equity, might either refuse absolutely to decree the performance, or refuse unless the plaintiff would execute what was right in the premises. On the other hand, there may be agreements of the general nature now under consideration, the enforcement of which, after a divorce, would be legal, equitable, and just.

§ 722. In a late Massachusetts case, it appeared that by articles of separation a husband covenanted, in consideration of his wife's withdrawing a libel for divorce, to pay a sum yearly to a trustee for her use during her life. Afterward the wife, by another similar libel, obtained a decree of divorce from the bond of matrimony, and for alimony, fixed, by agreement at the same sum which was payable under the articles; and the wife, after receiving two instalments of the alimony, married another man, whereupon the alimony was reduced by the court to a nominal sum. It was therefore held, on a suit brought by the trustee against the husband, that the latter was not holden, under these circumstances, to pay the money he had contracted in the articles to pay. It seemed to be admitted in the case, that the decree for alimony was, by the understanding of the parties and the court at the time it was pronounced, to stand in the stead of the provision made under the articles; therefore the articles

were, for this reason, if no other, practically made void by the decree in the divorce suit.¹

§ 723 [673]. *Capacity to be Witnesses in each other's Suits.*

After the marriage is dissolved by divorce, the wife has not the incapacity of interest preventing her from being a witness for or against her late husband, in his suits. Still whatever occurred during the coverture remains under the protection of the rule of public policy, which, to promote freedom and harmony in matrimonial intercourse, holds as confidential all facts affecting either party, the knowledge whereof came from any source to the other during the subsistence of this relation.² Therefore when the relation is terminated by divorce, the woman is on this ground disqualified to testify against her former husband, concerning any matter occurring while it continued.³ But the privilege of this protection may be waived by both parties consenting to waive it, after a divorce, though it appears they will not be permitted to waive it before;⁴ and so, if the divorced wife is willing, she may testify in favor of her late husband to whatever happened during the coverture. Thus, in an action for criminal conversation, brought by the husband against the adulterer, the divorced wife is a competent witness to prove the adultery.⁵ And this principle has been carried to the extent of permitting the widow, the marriage being dissolved by death, to testify to disclosures of the husband, which "he could not have wished to conceal, but must have desired to make known, through her, if he found no other means of doing

¹ *Albee v. Wyman*, 10 Gray, 222.

² 1 Greenl. Ev. § 334, 335, 338.

³ *Barnes v. Camack*, 1 Barb. 392; *The State v. J. N. B.*, 1 Tyler, 36, overruled in *The State v. Phelps*, 2 Tyler, 374; *The State v. Jolly*, 3 Dev. & Bat. 110; *Monroe v. Twistleton*, Peake Ev. App. ed. of 1822, p. 89, Peake Ad. Cas. 219.

⁴ *Barker v. Dixie*, Cas. temp. Hardw. 264; 2 Daniell Ch. Pract. Perkins's ed. 988; 1 Greenl. Ev. § 340. Yet see *Merriam v. Hartford and New Haven Railroad*, 20 Conn. 354.

⁵ *Ratcliff v. Wales*, 1 Hill, N. Y. 68; *Dickerman v. Graves*, 6 Cush. 308. And see *Stanton v. Willson*, 3 Day, 37.

so:"¹ In like manner, during the coverture, where a statute takes away the disqualification of interest, the wife, it has been held, may be a witness *for* her husband.²

§ 724 [674]. *Other Consequences.* The dissolution of a valid marriage does not impair the right of the husband to maintain, against a third person, the action of criminal conversation for debauching the wife while the coverture existed.³

§ 725 [675]. But such dissolution takes away the husband's right to administer on his late wife's estate after her decease. Yet conduct which would have entitled the wife to a divorce, if she had applied for it, does not have the effect, if in fact no divorce was obtained.⁴

¹ The State v. Jolly, 3 Dev. & Bat. 110; Hester v. Hester, 4 Dev. 228. Professor Greenleaf, 1 Greenl. Ev. § 338, after saying, the rule concerning confidential communications has an application to husband and wife like what it has to client and attorney, adds: "Accordingly the wife, after the death of the husband, has been held competent to prove facts coming to her *knowledge from other sources*, and not by means of her situation as wife, notwithstanding they related to the transactions of her husband." And he cites Coffin v. Jones, 13 Pick. 445; Williams v. Baldwin, 7 Vt. 506; Welles v. Tucker, 3 Binn. 366. These authorities certainly give some countenance to this distinction, but no one of them appears very clearly to establish it; and it is believed that the view taken in the text best accords both with the reason of the thing and the decided cases. Yet perhaps the true view may be to consider the reasoning of the text as applicable to cases where the husband, after a divorce, is a party to the suit, or his legal representatives, after his death, are parties; and the reasoning of Professor Greenleaf as applicable to cases, where, if the husband were alive, he would be a competent witness, but where, at the same time, neither the husband nor the wife could be called upon to disclose matters resting in the confidence of the matrimonial relation. And see McGuire v. Malony, 1 B. Monr. 224; Aveson v. Kinnaird, 6 East, 188. Yet see Cornell v. Vanartsdalen, 4 Barr. 364, and other cases cited by Greenl. in later editions.

² Merriam v. Hartford and New Haven Railroad, *supra*. And see Mayrant v. Guignard, 3 Strob. Eq. 112; Bisbing v. Graham, 2 Harris, Pa. 14.

³ Ealer v. Flomerfelt, 1 Wheat. Dig. ed. of 1843, 828, 1 Ashm. 53, note; Ratcliff v. Wales, 1 Hill, N. Y. 63; Dickerman v. Graves, 6 Cush. 308.

⁴ Altemus's case, 1 Ashm. 49. And see Lodge v. Hamilton, 2 S. & R. 491.

III. *The Divorce from Bed and Board.*

§ 726 [676]. We have already had occasion incidentally to consider various points concerning the effect of a divorce from bed and board.¹ The cardinal doctrine is, that the marriage remains in full force, but the parties are legally authorized to live separate. Yet the precise effect of this divorce, in many minor particulars, is subject to doubt and conflict in the American authorities; though most of these questions are settled in England. Perhaps the true view is to consider the result as modified by the phraseology of different statutes, and sometimes by the language of the specific decree.

§ 727 [677]. Obviously a divorce from bed and board does not entitle either of the parties to marry again. And there is no difference in this respect, whether it was granted by a domestic or a foreign tribunal.² We have seen, that there was a time in the history of the English law, when persons separated *a mensâ et thoro* were not punishable as polygamists, if they contracted a second marriage; yet the second marriage was void, the same as now; because the first was still subsisting.³

§ 728 [678]. In England the 107th canon of 1603 provides,⁴ that, "in all sentences pronounced only for divorce and separation *a thoro et mensâ*, there shall be a caution and restraint inserted in the act of the said sentence, that the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with other persons. And for the better observation of this last clause, the said sentence of divorce shall not be pronounced until

¹ Ante, § 226, 228, 435-440, 442.

² *Young v. Naylor*, 1 Hill, Eq. 383.

³ Vol. I. § 297, 299; ante, § 225.

⁴ In respect to these canons, see Vol. I. § 51, 318; ante, § 241.

the party or parties requiring the same shall have given good and sufficient caution and security into the court, that they will not any way break or transgress the said restraint or prohibition."¹ In obedience to this canon, the Ecclesiastical Courts required the promoter, on the cause being assigned for hearing, if the husband, to give a bond in one hundred pounds, with one surety payable to the judge personally, his executors, and administrators, conditioned that he will not at any time thereafter, during the life of the defendant, intermarry with any other individual. If the wife is the party promoting, a man must execute the bond in her stead.² This must be done before the sentence of divorce is signed; otherwise, by the 108th canon, the sentence itself is void. But it is held, that, if the bond is omitted through mistake, the court has power to correct the error, by permitting it to be filed afterward, and then signing the sentence anew.³ This is a peculiarity of the English canon law, probably not binding upon any of the American tribunals; there being no reported case in which the practice has been followed.

§ 729 [679]. It was observed by the Louisiana court, that a divorce from bed and board as completely separates the parties as a divorce from the bond of matrimony; except that, after the former, neither of them can legally marry again.⁴ If the Louisiana law is as thus indicated, it differs greatly from the law of England and of the other American States. A more accurate statement of the general law would be, that a divorce from bed and board works no change in the relation of the parties, either to each other or to third persons, except in authorizing them to live apart until they mutually come together.⁵ In coming together, no new mar-

¹ Poynter Mar. & Div. 339.

² Coote Ec. Pract. 343, 344.

³ *Dysart v. Dysart*, 1 Robertson, 543.

⁴ *Savoie v. Ignogoso*, 7 La. 281, 285. But the divorce does not dissolve the marriage. *Gee v. Thompson*, 11 La. An. 657.

⁵ "The divorce is only a legal separation, terminable at the will of the parties; the marriage continuing in regard to every thing not necessarily withdrawn from its operation by the divorce." *Dean v. Richmond*, 5 Pick. 461, 468; ante, § 228.

riage is required; neither, it seems, under the general law, are any new proceedings in court necessary; but the reconciliation, of its own force, annuls the sentence of separation. How this particular matter stands under various statutory enactments, and under decrees differing in form from the English, appears not clear upon the authorities.¹

§ 730 [680]. This divorce does not, at common law, and without statutory aid, change the relation of the parties as to property.² Thus it neither takes away the right of the wife to dower, nor entitles her to recover it during the life of the husband.³

§ 731 [681]. For the reasons already mentioned, this divorce does not, at the common law, take from the husband his right to the possession of the wife's real estate, either during her life or after her death, if he is otherwise entitled to it, as tenant by the curtesy.⁴ But some of the States have the statutory provision, that, upon the divorce, she may take immediate possession of her real property. Still such a statute does not operate to destroy the matrimonial relation; it only authorizes her to recover and enjoy her lands, even as against purchasers from the husband for a valuable consideration, in like manner as if the coverture were terminated. She may enforce this right in an action against the tenant.⁵

§ 732 [682]. In like manner the husband's common law right to reduce into possession the wife's choses in action

¹ *Barrere v. Barrere*, 4 Johns. Ch. 187; *Thompson v. Thompson*, 2 Dall. 128; *McKarracher v. McKarracher*, 3 Yeates, 56; *Stephens v. Totty*, Cro. Eliz. 908.

² *Kruger v. Day*, 2 Pick. 316; *Clark v. Clark*, 6 Watts & S. 85; *Dean v. Richmond*, 5 Pick. 461.

³ *Park on Dower*, 20; *Stowell's case*, Godb. 145; *Powell v. Weeks*, Noy, 108; *Godol. Ab.* 505; *Tebbs on Adultery & Div.* 218. And see *Potier v. Barclay*, 15 Ala. 439; *Gee v. Thompson*, 11 La. An. 657.

⁴ *Smoot v. Lecatt*, 1 Stew. 590; *Rochon v. Lecatt*, 2 Stew. 429; *Clark v. Clark*, 6 Watts & S. 85.

⁵ *Kruger v. Day*, 2 Pick. 316; and see *Page v. Estes*, 19 Pick. 269.

remains, after this divorce, as before.¹ And he may release a chose in action, as a legacy, due to her.² But he cannot release her judgment for costs against himself in the divorce suit; because, since the law gives her the authority to act adversely to him, in this suit, it carries with the authority all the necessary consequences.³ Neither, it appears, can he release her costs against a third person, where she has the right to sue sole in a matter which concerns her individually. Thus where a wife, divorced *a mensâ et thoro*, had proceeded in the spiritual court against a woman for adultery with her husband, and there obtained a decree for costs against this woman; which costs he had released, but the spiritual court refused to acknowledge the release, and the adulteress applied to the common-law court for prohibition; Lord Chief Justice Holt stated the law, with its reasons, as follows: "If a *feme covert* sue sole in the Ecclesiastical Court for defamation, as she may if she cohabit with her husband, he may release the costs; but, if they are divorced *a mensâ et thoro*, there, in such case, or of incontinency, &c., he cannot release the costs; and the reason is, that, if they are divorced *a mensâ et thoro*, the husband allows his wife *alimony*, and the costs of the suit are out of the alimony; and therefore he cannot discharge the one more than the other. . . . Yet if the suit be there for a legacy devised to the wife, which is originally due to the baron and feme, and is not part of the alimony, he may release the suit, and also the costs; because he may discharge the principal. My opinion is, there should be a prohibition in this case. But here you say alimony is sentenced to Hewson's wife; prove that, and then it is in our discretion not to grant a prohibition."⁴ In another case, where the husband had released the costs of his wife, and the spiritual court had declined to give effect to the release, prohibition was refused, Houghton, J., observing: "The

¹ *Ames v. Chew*, 5 Met. 520; *Dean v. Richmond*, 5 Pick. 461.

² *Stephens v. Totty*, 1 Cro. Eliz. 908.

³ *Stevens v. Stevens*, 1 Met. 279.

⁴ *Chamberlaine v. Hewson*, 5 Mod. 70.

matter in question is for slandering the wife, and this is personal to the wife, and the determination of this is left unto them there.”¹

§ 733 [683]. The husband's right to the wife's choses in action, after a divorce from bed and board, is recognized, in the absolute sense, only at law; in equity it is considerably restricted. In the first place, she has here her general equitable claim to a provision out of them. But in the next place, equity may, it sometimes does, interfere in her behalf by injunction. Thus in an early case the husband, after a divorce from bed and board, was restrained from selling a term belonging to his wife.² And where, after such a divorce on account of the husband's cruelty, a legacy fell due to the wife, the Supreme Court of New York enjoined him from receiving any part of it; intimating, however, that the reception of the whole by her might furnish ground for the reduction or discontinuance of her alimony. And Barculo, J., observed: “The rule of the court of equity in such cases follows that of natural justice; the husband, by his violation of the marriage contract, forfeits all equitable right to the wife's property. Even when the property has belonged to her before the separation, and has not been reduced into actual possession by the husband, courts of equity will restore it to the wife. Much more, in a case like the present, where the property falls to the wife after the separation, should the equitable power of the court be interposed to prevent the husband from receiving it, by virtue of that relation which he himself has disregarded and violated. It would be difficult to conceive a more plain and palpable outrage upon justice, than to permit this old lady to be deprived of her whole share of her father's estate, by an exercise of his marital rights on the part of a husband whose cruelty has driven her from an honorable home, and occasioned a per-

¹ *Mottaram v. Mottaram*, 3 Bulst. 264; and see *Giba. Cod.* 445.

² *Anonymous*, 9 Mod. 43, 44; 2 *Bright Husb. & Wife*, 363.

manent suspension of the marriage contract. The authorities are full on this subject."¹

§ 734 [684]. In the case last mentioned, the legacy fell to the wife after the separation, and there were no intervening rights of third persons. But where, in England, a wife obtained, subsequently to the bankruptcy of her husband, a divorce from bed and board on the ground of his adultery and cruelty, the court held, that this did not entitle her in equity to the whole of a fund bequeathed to her, which came into possession after the bankruptcy, although no settlement was made upon her at her marriage, and the husband had then received 1,500*l.* stock in her right. The Vice-Chancellor said, "he was of opinion, that, if the separation and divorce from the husband could, in any case, give a special equity in the wife, it would not affect this case; because the whole proceeding was subsequent to the bankruptcy, and consequently after the right to the legacy had vested in the assignee; but there must be a reference to a master to approve of a proper settlement upon the wife."²

§ 735 [685]. In some of the United States, the common-law doctrine concerning the wife's choses in action, on a divorce from bed and board, has given place to statutory provisions. It was so in Massachusetts, by Stat. 1828, c. 52, § 2, which has been superseded by a more general provision in the Revised Statutes.³ The earlier statute directed, that, upon such divorce decreed at the prayer of the wife, her choses in action, not reduced by the husband to possession, should remain her property; and it was held, that an assignment of them by the husband for a valuable consideration, before divorce granted, is not a reduction to possession. Though assigned, she can hold them as against the assignee,

¹ *Holmes v. Holmes*, 4 Barb. 295, referring to *Vanduzer v. Vanduzer*, 6 Paige, 366; *Fry v. Fry*, 7 Paige, 461; *Renwick v. Renwick*, 10 Paige, 420.

² *Green v. Otto*, 1 Sim. & S. 250, 252. See ante, § 715, and *Browning v. Headley*, there cited; *Davis v. Newton*, 6 Met. 537.

³ R. S. c. 76, § 28; reenacted Gen. Stats. c. 107, § 40.

who can stand only in the place of the husband, with no other rights than his, which rights the divorce had terminated.¹

§ 736 [686]. Whether the wife, after a divorce from bed and board, may sue and be sued at law, is a question of some difficulty and doubt. In England, coverture is never an impediment to a suit in the Ecclesiastical Courts; married women being there plaintiffs and defendants, without even the intervention of a next friend. But the rule, it is well known, is otherwise in the courts of law; and in them, notwithstanding a divorce from bed and board, the English common-law doctrine at the present day does not hold the wife liable to be sued.² The converse of this is probably not decided; still little room for doubt can exist, that the same tribunals would hold the wife, who had obtained a divorce from bed and board, incapable of maintaining an action. The ecclesiastical decree, however, for this kind of divorce, does not also give to the wife the custody of children; neither does it restore to her any portion of her former estates; neither does it give her again the title in her choses in action; while, in the United States generally, these and other like things are done under statutes, which seem, therefore, to place her in a condition approximating more nearly to that of a *feme sole* than she sustained in the English law. And Parker, C. J., observed in a Massachusetts case: "Where the law itself has separated them, and established separate interests and separate property, it acknowledges no such absurdity as to continue the power of the husband over every thing but the person of the wife."³ And this matter, in some of the States, as Louisiana,⁴ is regulated by statutory provisions which expressly qualify the wife to sue and be sued. So at present in England, Stat. 20 & 21 Vict. c. 85, § 25, 26,

¹ Page v. Estes, 19 Pick. 269. And see ante, § 715 and note, where it appears that the authorities on this subject are not harmonious.

² Lewis v. Lee, 3 B. & C. 291; Elah v. Leigh, 5 T. R. 679.

³ Dean v. Richmond, 5 Pick. 461, 466.

⁴ Bonneau v. Poydras, 2 Rob. La. 1.

has altered the common-law doctrine; giving the wife, in such circumstances, somewhat the rights of a *feme sole*, with capacity to sue and be sued.

§ 737 [687]. There are circumstances wherein, of necessity, the wife must sue; as, when she would enforce payment of her alimony.¹ But aside from this particular necessity, the Massachusetts doctrine is plain, that the divorce from bed and board qualifies her generally both to sue and be sued. "After such divorce," observes Shaw, C. J., "the law of this Commonwealth recognizes her right to acquire and hold property, to take her own earnings to her own use, for the support and maintenance of herself and children. She is deprived of the protection, and exempted from the control, of her husband. She may, by the decree of the court granting the divorce, and pursuant to the provisions of the statute law of the Commonwealth, be charged with the custody, and consequently with the support and maintenance, of the children of the marriage. The reason, therefore, why a wife cannot sue or be sued, without joining and being joined with her husband, does not exist. But the relation in which the divorce *a mensâ et thoro* places the parties opposes such a joinder. If it were necessary to join the husband as plaintiff, he might release her rights, by which she would be subjected to costs; if he might be joined as defendant, he might be made subject to her debts; both of which consequences are repugnant to the new relation of divided and separate interests, in which the law, by such a decree, places them. Whilst the law thus recognizes the right of a woman, so divorced, to acquire and take the proceeds of her industry to her own use, it recognizes her power to make contracts; and, if she could not sue or be sued, it would present the anomalous case, in which the law recognizes a right without affording a remedy for vindicating it, and subjects a party to a duty without

¹ *Wheeler v. Wheeler*, 2 Dane Ab. 310; *Lefevre v. Murdock*, Wright, 205; *Howard v. Howard*, 15 Mass. 196; *Clark v. Clark*, 6 Watts & S. 85; post, § 738.

lending its aid to enforce it.”¹ In the other States generally the question is not well settled; for, while there are cases appearing to favor the Massachusetts doctrine,² the opposite scale is not without its weight of apparent authority.³

§ 738 [688]. In South Carolina, the court having no power to grant divorces decreed alimony to a wife on her bill praying for alimony only,⁴ and ordered the husband to give security for its payment. He refused; an attachment issued against him. The sheriff, having taken him into custody, suffered him to escape; and it was held, that the wife might maintain, by her next friend, an action at law against the sheriff for this escape. Said the court, by Smith, J.: “It was urged in the argument, that this woman, being a *feme covert*, could not maintain the action by her next friend. If that argument were to prevail, there would be a failure of justice, which our law abhors; as there would be no means of enforcing a decree of a wife against her husband for alimony. The court of equity could order a refractory husband to be attached, and the sheriff would let him go if he thought proper; then, if the wife could not sue by her next friend, who could? The law provides no other course. And upon this occasion I would adopt the course of a very learned judge, — ‘If there is no precedent, I will make one.’”⁵

§ 739 [689]. The general law of husband and wife entitles the former, as of right, to administer on the effects of the latter, after her decease.⁶ This right is not taken away

¹ *Pierce v. Burnham*, 4 Met. 303, 305; *Dean v. Richmond*, 5 Pick. 461.

² *Lefevre v. Murdock*, Wright, 205; *Taylor v. Simpson*, 5 J. J. Marshall, 689; post, § 738. And see *Benadum v. Pratt*, 1 Ohio State, 403.

³ *Burr v. Burr*, 10 Paige, 166; *Clark v. Clark*, 6 Watts & S. 85; *Barber v. Barber*, 1 Chand. 280.

⁴ Ante, § 353-363.

⁵ *Prather v. Clarke*, 1 Tread. 453.

⁶ *Humphrey v. Bullen*, 1 Atk. 458; *Sands's case*, 3 Salk. 22; *McCoaker v. Golden*, 1 Bradf. 64; *Elliott v. Gurr*, 2 Phillim. 16, 1 Eng. Ec. 166; *Browning v. Reane*, 2 Phillim. 69, 1 Eng. Ec. 190; *Steadman v. Powell*, 1 Add. Ec. 58, 74, 2 Eng. Ec. 26, 34; *Wilkinson v. Gordon*, 2 Add. Ec. 152, 2 Eng. Ec. 257; 1 Williams on Ex. 242; *Toller on Ex.* 83.

by the divorce *a mensâ et thoro*; and the husband may claim it, though his guilt led to the divorce.¹ But the wife has not the same absolute right of administration, on the decease of her husband;² and it is a proper exercise of the discretion of the court to refuse her, in favor of his son, if a divorce for her adultery has been pronounced.³

§ 740 [690]. The law presumes married persons, separated from bed and board by sentence of court, to live in the due observance of the sentence; and, if children are born of the wife during the separation, they are *primâ facie* illegitimate; though it is otherwise where the parties are living apart by consent.⁴

§ 741 [691]. There is hardly need to say, what is sufficiently obvious, that this divorce does not deprive the wife of any estate or property rights she may hold independently of her husband, or adversely to him. And if there is a valid deed of separation, in which he covenants to pay a third person an annuity for her use, his covenants will bind him, as well after this divorce as before.⁵ It appears, however, that there are cases wherein, without reference to the question of a divorce, "the husband would be entitled," in the language of Wilde, J., "to come into a court of equity to restrain the trustees of his wife from proceeding at law for her separate maintenance, or where the court would refuse her relief on a bill to enforce a trust therefor. But to justify the court thus

¹ Clark v. Clark, 6 Watts & S. 85.

² Sands's case, supra; Dew v. Clark, 1 Hag. Ec. 311; Conyers v. Kitson, 3 Hag. Ec. 556, 5 Eng. Ec. 202; In the goods of Williams, 3 Hag. Ec. 217, 5 Eng. Ec. 82; Spratt v. Harris, 4 Hag. Ec. 405; Stretch v. Pynn, 1 Lee, 30, 5 Eng. Ec. 296; Atkinson v. Barnard, 2 Phillim. 316, 1 Eng. Ec. 271; Webb v. Needham, 1 Add. Ec. 494, 2 Eng. Ec. 189.

³ In the goods of Davies, 2 Curt. Ec. 628, 7 Eng. Ec. 233.

⁴ St. George v. St. Margaret, 1 Salk. 123; Van Aernam v. Van Aernam, 1 Barb. Ch. 375.

⁵ Jee v. Thurlow, 2 B. & C. 547, 4 D. & R. 11; Dr. Lushington, in Cood v. Cood, 1 Curt. Ec. 755, 763, 6 Eng. Ec. 452, 456. And see Brown v. Brown, 2 Md. Ch. 316.

to interfere, the misconduct of the wife must be clearly proved; such, as that she had been guilty of adultery or criminal conversation, or had left her husband without any cause whatever."¹

¹ *Ayer v. Ayer*, 16 Pick. 327, 332; *Moore v. Moore*, 1 Atk. 272; *Lee v. Lee*, 1 Dick. 321, 2 Dick. 806. See ante, § 719; *Cartwright v. Cartwright*, 19 Eng. L. & Eq. 46.

CHAPTER XLII.

THE SENTENCE AND ITS EFFECT AND STABILITY.

Sect. 742. Introduction.

742-747. The Rendition of the Sentence.

748-752. Its Stability and Effect as between the Parties.

754-767. The Same as Respects third Persons.

§ 742. In the present chapter, the following matters will be considered: I. The Rendition of the Sentence; II. Its Stability and Effect as between the Parties; III. The Same as respects third Persons.

I. *The Rendition of the Sentence.*

§ 743. In England it is provided by Stat. 23 & 24 Vict. c. 144, § 7, that "every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court; and, on cause being shown, the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or

otherwise, as justice may require."¹ There is not, in our States generally, any provision corresponding to this recent English one.

§ 744. But it is a general principle of procedure pervading our law, that, at any time during the term of the court at which a judgment is rendered, it may be recalled or modified as the judges may direct.² This practice may be made available in a divorce suit, without resorting to other principles which will be discussed in subsequent parts of the present chapter.

§ 745. The books do not give us any very exact statements as to what the decree or sentence of divorce must contain. In the facts of the cases, it is often found, especially where the proceeding is in equity, to embrace matter which plainly need not be in it. And even Chancellor Walworth once made use of the following language: "There must be a decree in this case dissolving the marriage contract, and the usual clause must be inserted in every case of this kind, prohibiting the defendant from marrying during the lifetime of the complainant. Although the defendant would be punishable for felony if he married again, yet this clause is necessary in order to prevent him from imposing upon others, who might suppose he was capable of contracting matrimony if the decree was general."³ Now, it is quite aside from the proper function of a legal judgment to notify third parties of what all persons are presumed to know, namely, the contents of the statute-book of the State. There can be no pretence,

¹ The remaining part of this section provides for the intervention of the Queen's proctor, as see ante, § 32. As to the practice under this provision for the decree nisi, see *Boulton v. Boulton*, 2 Swab. & T. 405; *Stoate v. Stoate*, 2 Swab. & T. 384; *Lewis v. Lewis*, 2 Swab. & T. 394.

² *McRaven v. McGuler*, 9 Sm. & M. 34; *Neale v. Caldwell*, 3 Stew. 134; *Acre v. Ross*, 3 Stew. 288. See further, on this general matter, *Brookfield v. Morse*, 7 Halst. 331; *Taylor v. Starr*, 2 Root, 293; *Patton v. Massey*, 2 Hill, S. C. 475; *Wilkerson v. Goldthwaite*, 1 Stew. & P. 159; *Hickman v. Barnes*, 1 Miss. 156.

³ *Graves v. Graves*, 2 Paige, 62.

and there was none put forward in this case, that the clause spoken of is of any legal validity, or in any way essential to the complete efficacy of the judgment as to the main matter. And it cannot be doubted that most judges at the present time would discountenance the insertion of such a clause in a decree or sentence for a divorce.

§ 746. We saw, in the last chapter, what are the legal consequences of a divorce ; and, on sound principle, the sentence need not set out those consequences. But there may be statutory provisions, drawn in such terms as to leave it doubtful whether what is provided for follows, as of course, upon this sentence, or whether it should not be mentioned in the sentence. In such a case, the decree may very well, until the point has been settled by judicial interpretation, include the doubtful matter ; for caution, in legal proceedings, is as commendable as it always is in all other proceedings.

§ 747. There are some other points connected with the decree ; but the decisions relating to them are few, and it is deemed best therefore not to discuss them particularly here. The general doctrines which govern in the like matters, in other causes than divorce, will be found ordinarily sufficient to guide practitioners and courts with respect both to these points and to many other things which might with propriety be discussed in this chapter. The remaining part of this chapter will be devoted to a reproduction, in substance, of the matter which constituted the chapter in the earlier editions, without those extensive additions which a general search through analogous departments of the law has put it into the power of the author to make, and which he at one time contemplated.

II. *Stability and Effect of the Sentence as between the Parties.*

§ 748. [694]. In another part of the present volume, some allusion has been made to the question of granting a rehear-

ing in the divorce cause, on a motion for a new trial, or the like.¹ But aside from the doctrines there disclosed, we may observe, that, according to what appears to have been the doctrine of the English ecclesiastical tribunals, in regard to their own adjudications, a sentence against the validity of a marriage was never final; but was ever open to revision and reversal.² This doctrine is expressed in terms sufficiently broad to embrace suits for nullity, whether proceeding on the allegation that the marriage was originally void, or only that it was voidable. In the *Duchess of Kingston's* case, it was stated by Dr. Calvert, of counsel for the defendant, in words substantially concurred in on all sides, thus: "There can be no determination against a marriage, but what is open to future litigation. We all know, that in a question of marriage any person that has an interest may intervene before sentence given; and any persons having an interest, though they have neglected to intervene in that cause, might appeal within the proper time; nay, I will go so far as to say, that, if any person having an interest, should have so far neglected it as to omit availing himself of an intervention or appeal, yet he might still come before the court, show his interest, and be heard. A marriage cause goes further still; for I believe in most other cases a determination would be for ever binding, at least to the parties; but in these questions I conceive it is not; for, if there was to be a question between a husband and wife in a cause of jactitation, and, as in this cause, it was determined that there was no marriage; yet the party against whom that sentence was obtained, I apprehend, might appear afterwards, he might produce any new proof that he did not know of at the time, or, even if he had not produced what proof he had, he might be heard upon it. The reason of that indulgence I take to be this: by the canon law a marriage was held to be indissoluble, and for

¹ Ante, § 258-260.

² *Poynter Mar. & Div.* 157; *Shelford Mar. & Div.* 474; 2 *Burn Ec. Law*, 485; *Oughton*, tit. 306. And see *Robins v. Crutchley*, 2 *Wils.* 118, 122, 127; *Bowser v. Ricketts*, 1 *Hag. Con.* 213, 214; *Morris v. Webber*, 2 *Leon.* 169; *Meadows v. The Duchess of Kingston*, *Amb.* 756; *Barrs v. Jackson*, 1 *Y. & Col. C. C.* 585, 596.

that reason a sentence against it never could be final; *sententia contra matrimonium nunquam transibit in rem judicatam*.

The canon law, it is well known, has been received in this country with respect to marriage, particularly as to that position of its being indissoluble. In most other questions, as of property, a person might be bound by time, bound by not making so good a case as he should have done; but, as a person cannot release himself from the obligations of marriage by any lapse of time, or any neglect in stating his case, the question is ever open."¹ We have already had occasion to consider one illustration of this doctrine, in respect to impotence; where it is held, that, if parties are divorced for impotence, and the alleged impotent person marries again, and has children, the spiritual court may annul the sentence of divorce, even after the second marriage; thus reviving the first marriage, and rendering the second, which was originally good, a nullity.²

§ 749 [695]. While the principle stated in the last section is clearly supported by the Roman canonical authorities; and is assumed by all the text-writers, and by some judges, to be law in the ecclesiastical tribunals; yet it by no means follows that it is so in the latter, because it is found in the former.³ Neither has it been often, if at all, practically acted upon in modern times; nor is it apparent that it has received other direct judicial confirmation. And from the English tribunals have fallen observations which might lead us to doubt, whether, upon a proper occasion, that principle would not be discarded in them, or greatly modified. Thus Sir John Nicholl, speaking of nullity of marriage by reason of impotence, said: "By the canon law, the marriage is not absolutely dissolved; the parties are separated; and, if the church is deceived, the former marriage is to be renewed; and, if a sec-

¹ Duchess of Kingston's case, 20 Howell St. Tr. 355, 420, which pages compare with p. 406, 442, 443, 450, 451, 506, 507, 530.

² Vol. I. § 113 and note; *Morris v. Webber*, 2 Leon. 169.

³ Vol. I. § 52-55.

and marriage is contracted, it becomes null and void. What a state to place the parties in! This is something in the text law which I cannot readily assent to belong to the law of this country."¹ And in a more recent case, — where, indeed, the question was not directly involved, there being an effort made, in a suit concerning the administration of the effects of the deceased, to get rid of an unreversed sentence of nullity, — occur some observations of Sir Herbert Jenner Fust, quite indicative of the opinion, that a sentence of nullity, regularly pronounced, cannot, even on direct proceedings, be set aside, except for fraud or collusion. "According to your argument," he observed to counsel, "every child, and every child's child may bring a suit to have the sentence reversed; they will equally be strangers; I do not see where it is to stop."²

§ 750 [696]. There being no power in the Ecclesiastical Courts to dissolve a marriage originally valid, this doctrine, that a sentence against a marriage is ever open to revision and reversal, assuming it to have been law in those courts, might not apply to the divorce for offences committed during the coverture. Indeed we have seen,³ that, where it prevails, it rests upon the indissoluble nature of marriage. Whether therefore it can be extended to supervening causes of divorce, or even, whether it is applicable to suits for nullity in our tribunals, where no such notion of indissolubility exists, may well be doubted. The precise question has not received judicial elucidation in this country; but it may be of consequence to notice, that there is no reported American decision in which this doctrine is recognized, or even claimed to be law; and there are cases in which it may, perhaps, be considered to have been indirectly discarded.⁴ Some obvious reasons exist, why judgments apparently final, rendered in matrimonial causes, whether of nullity or divorce, should be

¹ Norton v. Seton, 3 Phillim. 147, 1 Eng. Ec. 384, 387; Vol. I. § 113.

² Meddowcroft v. Huguenin, 3 Curt. Ec. 403, 7 Eng. Ec. 438.

³ Ante, § 748.

⁴ See post, § 751.

even more stable, certainly not less, than the like adjudications in other matters. The matrimonial status of the parties draws with and after it so many collateral rights and interests of third persons, that uncertainty and fluctuation in it must be greatly detrimental to the public interests. Therefore in some of the States, there are legislative enactments which are intended to give peculiar inviolability to such judgments.¹

§ 751 [697]. As a general proposition, the American tribunals, when unencumbered by specific statutory directions, have been governed by substantially the same principles in divorce causes, as in others, in respect to opening decrees, or granting rehearings, writs of error, or *certiorari*; or otherwise, according to the practice of the court, reëxamining the question; except that there has always been a manifest reluctance to disturb a final judgment of divorce, especially after a second marriage, involving the interests of third persons.² And in New York, a husband having obtained a decree dissolving his marriage, on default of the wife, upon whom process was irregularly but personally served in New Jersey; and having, shortly afterward, married another woman, who was ignorant of the irregularity, — the divorced wife was indeed permitted to come in and contest the suit; but, for the protection of the other woman, the Chancellor ordered, that the original decree remain in full force until the result of the litigation should be reached. And he observed: "The defendant does not state

¹ In Kentucky, the Court of Appeals has no power to reverse a decree *granting* a divorce. *Maguire v. Maguire*, 7 Dana, 181; *Thornberry v. Thornberry*, 4 Lit. 251; *Bogges v. Bogges*, 4 Dana, 307. And see *Watkinson v. Watkinson*, 12 B. Monr. 210, where, the lower court having dismissed the plaintiff's bill, and divorced the defendant on her cross-bill, the Court of Appeals reversed the former decree, and gave a divorce to the plaintiff.

² *Olin v. Hungerford*, 10 Ohio, 268; *Platt v. Piatt*, 9 Ohio, 87; *Laughery v. Laughery*, 15 Ohio, 404; *Johnson v. Johnson*, Walk. Mich. 309; *Smith v. Smith*, 4 Paige, 432; *Colvin v. Colvin*, 2 Paige, 385; *Dunn v. Dunn*, 4 Paige, 425; *Bourne v. Simpson*, 9 B. Monr. 454; *Jeans v. Jeans*, 8 Harring. Del. 186; *Bogges v. Bogges*, 4 Dana, 307; *Evans v. Evans*, 5 B. Monr. 278; *Lucas v. Lucas*, 3 Gray, 186; *Sheafe v. Sheafe*, 9 Fost. N. H. 269; *Smith v. Smith*, 20 Misso. 166; *Hoffman v. Hoffman*, 6 Casey, 417; *Mansfield v. Mansfield*, 26 Misso. 163; *Tappan v. Tappan*, 6 Ohio State, 64.

when she received notice that the divorce had been actually obtained. The complainant swears, that he showed it to her under the seal of the court on the sixteenth of October, and before the second marriage; and it appears, that she took no steps to set aside the proceedings for nearly a month afterwards. This delay was probably not sufficient to make it the duty of the court to bar her of her rights, if she has any, by leaving the decree to stand as conclusive against her. But in the mean time the second marriage has rights." The defence alleged was, that the husband had forgiven the adultery for which he brought his suit.¹ It has been made a query in New York, whether, after a decree dissolving the marriage has been rendered, the defendant can come in by a cross-bill in the nature of a bill of review, and show, that, pending the suit, the complainant was guilty of adultery, the fact not having been discovered until after the final adjudication.² If a party has used the privileges of a decree of divorce, he has thereby affirmed it, and he is too late to complain of any of its burdens.³

§ 752 [698]. After a decree dissolving the marriage, on the ground of the wife's alleged adultery, had been regularly pronounced and enrolled, the husband made oath that he had subsequently become convinced of her innocence; and the two joined in the prayer, that the enrolment might be opened and vacated, and the decree reversed. This request was granted, and the suit dismissed; but without prejudice to intervening rights of third persons. They further prayed, that the bill and all the papers should be taken from the files and destroyed. This the court refused to grant, because of intervening rights; but said, "to prevent any one who has no interest in the question from disturbing the peace of this family, the register is directed to seal up the pleadings and proceedings, together with the master's report, and not to suffer them

¹ *Dunn v. Dunn*, 4 Paige, 425.

² *Smith v. Smith*, 4 Paige, 432.

³ *Bourne v. Simpson*, 9 B. Monr. 454. And see *Gaines v. Gaines*, 9 B. Monr. 295; Vol. I. § 691.

to be copied or inspected, except by the special permission of the court." The Chancellor considered, that, assuming the husband to be mistaken in thinking his wife innocent, still the law favors condonation.¹

§ 753 [699]. If a tribunal has been imposed upon, the fraud² being of such a nature as to make the judgment of divorce void,³ it may vacate this judgment, when, upon a summary proceeding, it is made cognizant of the fraud. So the Pennsylvania court, in a recent case, decided upon the strength of the English authorities; and further, that the order vacating the decree of divorce was, after the time for an appeal had elapsed, conclusive; although a second marriage had been in good faith entered into, and although the vacating order was passed without actual notice to the party in the divorce suit against whom it operated. The authority principally relied upon to sustain this decision was the case of *Prudham v. Phillips*.⁴ "The principle," observed Gibson, C. J., "is a general one, and applicable alike to ecclesiastical sentences and common-law judgments. It has no relation to the doctrine of amendments, which make the record speak a language it did not speak before; the vacation is a new and independent judgment, of which the recorded entry is its appropriate evidence. . . . It may be an arbitrary act to expunge a sentence of divorce with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act, which was operative at the time; and under this first impression I would have decided as did the judge at *nisi prius*. But the legitimate husband has his rights; and, if any one must suffer from the invalid marriage, it is he who procured it. By the terms of the contract he took the lady for better, for worse; and, having assumed at

¹ *Colvin v. Colvin*, 2 Paige, 385.

² Post, § 757, 760-763.

³ See *Greene v. Greene*, 2 Gray, 361, 4 Am. Law Register, 42, and an article 4 Am. Law Register, 1.

⁴ *Prudham v. Phillips*, cited Amb. 763, 1 Harg. Law Tracts, 456, note. And see post, § 761.

least her moral responsibilities, he stands as to hardship in her place. He, therefore, has no right to complain."¹ The doctrine of this section has doubtless its limits and qualifications; but it has been so little developed by adjudication, that we cannot safely attempt to state what they are.

III. *Stability and Effect of the Decree as respects third Persons.*

§ 754 [700]. Whatever be the authority of the court which pronounces a sentence of divorce or of nullity, to revise or reverse it, on a proceeding instituted for the purpose, still, while it remains a sentence, it is, if free from fraud and collusion, binding upon that tribunal in all collateral proceedings; and upon all other tribunals, in all proceedings direct and collateral, whether between the same parties and their privies, or between strangers; not only in the country where the sentence was rendered, but, *the jurisdiction being admitted*, in all foreign countries. A sentence, to have this effect, must of course be a direct adjudication upon the specific fact of the marriage, or its dissolution; and a finding which might be inferred argumentatively, would be attended with no such consequence.² Moreover, in the case of a foreign divorce,

¹ *Allen v. Maciellan*, 2 Jones, Pa. 328.

² *Roach v. Garvan*, 1 Ves. sen. 157, 159; *Hillyard v. Grantham*, cited 2 Ves. sen. 246; *Meadows v. The Duchess of Kingston*, Amb. 756; *Prudham v. Phillips*, cited Ib. 763, Harg. Law Tracts, 456; 2 Burn Ec. Law, 495; *Rex v. Roche*, 1 Leach, 4th ed. 134; *Meddowcroft v. Huguenin*, 3 Curt. Ec. 403, 7 Eng. Ec. 438; s. c. on appeal before the Privy Council, 4 Knapp, 386; *Bunting v. Lepingwol*, 4 Co. 29, Sir F. Moore, 169; *Blackham's case*, 1 Salk. 290; *Guest v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548, 549; *Clews v. Bathurst*, 2 Stra. 960; *Dacosta v. Villa Real*, 2 Stra. 961; *Kenn's case*, 7 Co. 42; *Jones v. Bow*, Carth. 225; *Hatfield v. Hatfield*, stated 20 Howell St. Tr. 395; *Morris v. Webber*, 2 Leon. 169, Sir F. Moore, 225; *Dickson v. Dickson*, 1 Yerg. 110, 114; *Dorsey v. Dorsey*, 7 Watts, 349; *Legg v. Legg*, 8 Mass. 99; *Clarke v. Lott*, 11 Ill. 105; *Hake v. Fink*, 9 Watts, 336; 1 Brown's Civil Law, 96; *Story Conf. Laws*, § 594-597; 1 Greenl. Ev. 544, 545; 2 Ib. § 461; *Jenk. Cent.* 44; Harg. Law Tracts, 449; *Mansfield v. McIntyre*, 10 Ohio, 27; *Cooper v. Cooper*, 7 Ohio, 238; *Ryan v. Ryan*, 2 Phillim. 332, 1 Eng. Ec. 274; *Conway v. Beasley*, 3 Hag. Ec. 639, 5

it is quite immaterial whether or not it be for a cause allowed by the domestic law.¹ So, if parties are domiciled in an Indian country, where the husband abandons his wife; and by the Indian law the abandonment works of itself, without further proceedings, a dissolution of the marriage, it will be treated in the courts of a Christian State as a divorce.²

§ 755 [701]. It is perceived, that the rule thus stated accords to the sentence an effect beyond what is given to ordinary judgments *in personam*; and places it rather upon the footing of judgments *in rem*. Substantially such, in fact, is the sentence; or, to speak more accurately, it is an adjudication about a matter of *matrimonial status*, which of necessity binds the world, like the act of parties by which this status is originally assumed. Thus, if two individuals enter into an ordinary contract *in personam*, none but themselves and their privies are bound by it; but, if into a valid marriage, whereby a change in their status is wrought, third persons who have not been consulted must yield to the consequences. If, for example, a stranger to the marriage has a suit pending against the woman, it abates; the property to which he was looking for his pay is transferred to the husband, who may be a bankrupt; one having a judicial controversy with the husband, and relying upon the testimony of the woman, loses the evidence; and so of a variety of other consequences. For the same reasons, the like results follow the sentence of divorce or nullity. This is the case in respect to whatever rests upon the status itself; but perhaps there may be collateral rights and interests, which would depend on a different principle. Yet here the same general doctrines would seem to

Eng. Ec. 242; *Harding v. Alden*, 9 Greenl. 140; *Patterson v. Gaines*, 6 How. U. S. 550, 599; *Barber v. Root*, 10 Mass. 260. See query, *Scrimshire v. Scrimshire*, 2 Hag. Ec. 395; 4 Eng. Ec. 562, 569. And see *Sinclair v. Sinclair*, 1 Hag. Con. 294, 4 Eng. Ec. 412, 414; *Goodin v. Smith*, Milward, 236, 245.

¹ *Barber v. Root*, 10 Mass. 260; *Wall v. Williamson*, 8 Ala. 48; *Hull v. Hull*, 2 Strob. Eq. 174, 177, 178.

² *Wall v. Williamson*, *supra*; *Wall v. Williams*, 11 Ala. 826.

be applicable, whether the change of status were effected by the concurrent act of the parties, as it is when they are married; or by a decree of the court, as it is when they are divorced.

§ 756 [702]. It has been, with some show of authority, contended, that the doctrine of the conclusiveness of sentences in suits for nullity applies only to the parties to the suit and their privies, including persons who might have intervened, whether they really did so or not; at the same time, it has been admitted that such persons need not have had any notice of the proceedings, to be bound by them. As, therefore, the right to intervene in matrimonial causes extends, according to the English rule, to all persons who have any possible interest in the result;¹ the doctrine, even thus limited, would seem practically to cover in substance the whole ground. But it is held, that a child, *en ventre sa mère* at the time of pronouncing the sentence of nullity, is estopped by it;² and, on the whole, the sentence would appear, both upon principle and authority, to be, when free from fraud, conclusive upon all persons.³

§ 757 [703]. The Duchess of Kingston's case⁴ is sometimes referred to as deciding, that the king is not bound, in a criminal proceeding, by a sentence in favor of the defendant in a matrimonial cause; and sometimes as deciding, that a sentence in the peculiar suit of jactitation of marriage concludes nothing.⁵ The truth is, that the light shed from this case is very dim and uncertain, quite out of proportion to the vast array of talent and learning, and the multitude of words,

¹ Shelford Mar. & Div. 569; ante, § 309.

² Perry v. Meddowcroft, 10 Beav. 122. But not if procured by fraud. Harrison v. Southampton, 17 Eng. L. & Eq. 364, 21 Eng. L. & Eq. 343.

³ For the cases see ante, § 754.

⁴ Duchess of Kingston's case, 20 Howell St. Tr. 355, more briefly reported, 1 Leach 4th ed. 146, 1 East. P. C. 468.

⁵ 2 Smith Lead. Cas. 446; Shelford Mar. & Div. 473, 563.

which adorned and overwhelmed the proceedings. The facts in brief are, that the lady entered into a private marriage; cohabited under it for a time secretly; had issue, which died; disagreed with her husband, whereupon they separated; and after many years she brought against him a suit of jactitation of marriage, which he, colluding with her, defended, by setting up a marriage at a different time and place and under different circumstances from those which attended the real one. The witnesses to prove the marriage which did take place were designedly kept back; and he, failing of course to establish this feigned marriage, suffered, what both parties concurrently sought, sentence to go against him. The lady then entered into a second matrimonial alliance. After the death of the second husband, she was indicted for polygamy; and the indictment, on her prayer, and on account of her rank, was tried in parliament. She relied upon the fraudulent sentence in the jactitation suit; but it was held not to be a bar, and she was convicted. A sufficient reason for setting aside the sentence, according at least to modern determinations, is, that it was obtained through fraud and collusion, which vitiate all judgments; and it has been well questioned, whether the case should be received as authority for any thing beyond this point.¹

§ 758 [704]. In the discussion of this case, the distinguishing consideration, that the sentence in the jactitation suit involved, as all judgments in matrimonial causes do, the question of status, therein differing from most other final determinations in the Ecclesiastical Courts, was by no one distinctly presented. A multitude of other points were elaborated, but on what ground of law the decision did finally

¹ Wadd. Dig. 296, note; 2 Smith Lead. Cas. 446. Before the officers of the crown undertook the prosecution they consulted Mr. Hargrave upon the law; and he gave them an elaborate opinion, in writing, adverse to the crown on all points except that of fraud, which was the only thing, he contended, that could avoid the conclusive effect of the ecclesiastical sentence. The opinion was afterward published by the learned author of it, in *Harg. Law Tracts*, p. 449. See also *Barre v. Jackson*, 1 Y. & Col. C. C. 585, 590, 593; 1 *Brown's Civil Law*, 96, note.

rest, does not appear. In the course of the proceedings, the Lords put to the judges two questions, both of which were answered favorably to the prosecution; namely, "1. Whether a sentence of the Spiritual Court against a marriage, in a suit for jactitation of marriage, is conclusive evidence, so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy? 2. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud and collusion?"¹ For their negative answer to the first of the above questions, the judges assigned a variety of reasons, in such a manner as to leave us in doubt whether any one of them, and what one, would have been deemed sufficient of itself. Among the reasons are the following: first, that the party prosecutor in the indictment, namely, the king, was not a party to the jactitation suit; secondly, that the receiving of the sentence as conclusive "would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of common law, to which it solely and peculiarly belongs." But, thirdly, if the result be not as thus indicated in respect to a direct sentence, in a matrimonial cause involving the identical question, yet a sentence in a jactitation suit is not a direct determination upon the question of marriage.

§ 759 [705.] In respect to the last point taken by the judges, a jactitation suit is, indeed, of a peculiar nature. It seeks a kind of ecclesiastical injunction upon the defendant, against a species of matrimonial defamation. The libel complains, that the defendant has falsely and maliciously boasted of being married to the plaintiff, and prays for a decree of perpetual silence from such boasting. There are three defences, any one of which may be relied upon; namely,

¹ *Duchess of Kingston's case*, 20 Howell St. Tr. 355, 2 Smith Lead. Cas. 424.

first, a denial of the boasting; secondly, a setting up of a fact of marriage; thirdly, that, though there was really no marriage, the pretence of there having been one was authorized by the complainant. It is not claimed, that a sentence in a cause of jactitation, when either the first or third of these defences has been taken, amounts to a judgment upon the fact of marriage, having the force of a decree of nullity. But it is said, with apparent reason, that, when the second defence is made, "the proceeding," in the language of Lord Stowell, "assumes another shape, that of a suit of nullity, and of restitution of conjugal rights, on an inquiry into the fact and validity of such asserted marriage."¹ Yet where this second defence is made, the sentence against the marriage is in form materially different from the sentence rendered upon an original suit for nullity. In the latter suit, the adjudication finds, that there was a pretended marriage between the parties, but that, for causes set forth, it was and is null and void, and that the plaintiff was and is free from all bond of marriage with the defendant.² But in a jactitation cause, the corresponding determination is, not that there was a pretended marriage, which was a nullity, but that none was entered into, *as far as yet appears*.³ Still there are cases in which the sentence in such a suit has been received as conclusive upon the question of marriage.⁴

§ 760 [706]. But any adjudication, whether in a suit of jactitation, of nullity, or of divorce, in order to have the conclusive effect described, must have been obtained *bona fide*, and without fraud or collusion between the parties; for fraud in these causes, as in all others, vitiates every judgment into which it enters.⁵ According to a very familiar principle of

¹ *Hawke v. Corri*, 2 Hag. Con. 280, 287, 288; *Bodkin v. Case*, Milward, 355; Coote Ec. Pract. 357-360; 1 Browne Civil Law, 96, note; ante, § 290.

² Coote Ec. Pract. 402, 403; ante, § 265.

³ See the sentence which was relied upon in the *Duchess of Kingston's case*, 20 Howell St. Tr. 355, 390; *Bodkin v. Case*, Milward, 355, 361.

⁴ *Clews v. Bathurst*, 2 Stra. 960; *Dacosta v. Villa Real*, 2 Stra. 961.

⁵ Story Conf. Laws, § 597; Harg. Law Tracts, 479; *Brownsword v. Edwards*,

law, however, one would not be permitted to set up a fraud to which he was himself privy, in obtaining the sentence. And a still broader doctrine has been laid down, that only strangers to the sentence can make, on a collateral proceeding, this averment of fraud; for, it is said, a party to it might have it reversed, but a stranger could not.¹ If, however, the propositions to be stated in the next section are received as correct, it would seem clearly to follow, that a party to the sentence can never, either in a direct or collateral proceeding, set up against it the fraud in its procurement, and that this right exists only in privies and strangers.

§ 761 [707]. It has been held, that fraud and collusion, to avoid a sentence in a matrimonial cause, must have been practised by and between the *parties to that suit*. Thus, if the father were promoter in a proceeding to annul the marriage of a minor son, fraudulent conduct concerning it in the son, to which conduct the father was not privy, would not be admissible to impeach the sentence. And it appears to have been further held by the Privy Council, in *Meddowcroft v. Huguenin*, that no fraud of one of the parties alone would

2 Ves. sen. 243, 246; *Hake v. Fink*, 9 Watts, 336; *Conway v. Beazley*, 3 Hag. Ec. 639, 5 Eng. Ec. 242, 244, 245; *Roach v. Garvan*, 1 Ves. sen. 157; *Harg. Law Tracts*, 485; 3 Burge Col. & For. Laws, 1060, 1061; ante, § 754; *Harding v. Alden*, 9 Greenl. 140, 151; *Jackson v. Jackson*, 1 Johns. 424; 2 Kent Com. 109; *Harrison v. Southampton*, 17 Eng. L. & Eq. 364, 21 Eng. L. & Eq. 343, as to which see ante, § 756, note.

¹ *Prudham v. Phillips*, cited Amb. 763, 2 Burn Ec. Law, 495. In this case, according to Mr. Ford's note, as published by Mr. Hargrave, the court, after laying down the doctrine that fraud may be set up in answer to an ecclesiastical sentence of nullity, which has been offered in evidence, proceeded: "But who ever knew a *defendant* plead, that a judgment obtained against him was fraudulent? He must apply to the court; and, if both parties collude in the cheat upon the court, it was never known that either of them could vacate the judgment. Here defendant was party to the sentence; and, whether she was imposed upon, or she joined in deceiving the court, this is not the time or place for her to redress herself. She may, if she has occasion, appeal, or apply otherwise to the proper judge." *Harg. Law Tracts*, 456, note; *Habback on Succession*, 269. See *Pease v. Naylor*, 5 T. R. 80; *Meddowcroft v. Huguenin*, 3 Curt. Ec. 403, 7 Eng. Ec. 438; s. c. on Appeal, 4 E. F. Moore, 386; *Greene v. Greene*, 2 Gray, 361, 4 Am. Law Register, 1, 42; ante, § 753.

be sufficient, but that both must have participated in it, — that it must amount to collusion, whereby the parties jointly imposed upon the court. Lord Brougham observed: “The fraudulent suppression of evidence by one party would be insufficient. It is when the two parties combine together that it becomes collusion. In the words of Wedderburn, in the Duchess of Kingston’s case:¹ ‘A sentence obtained by fraud and collusion is no sentence. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit. There is no judge: but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious case proposed to him. There is no party litigating, there is no party defendant, no real interest brought into question; and, to use the words of a very sensible civilian on this point, *fabula, non iudicium, hoc est; in scend, non in foro, res agitur.*’”²

§ 762 [708]. It may sometimes be difficult to determine, whether the facts in a particular case amount to sufficient fraud to avoid the sentence; or what fraud will have the effect. Upon this subject, no very distinct lines have been drawn by the courts. In *Conway v. Beazley*, where there had been a Scotch divorce, *a vinculo*, and a second marriage, the second wife brought her suit for nullity on the ground that the Scotch tribunal had no rightful authority to dissolve the vinculum of the first marriage, which she contended was still in force; and Dr. Lushington, in the course of his opinion, observed: “It has been said, that the divorce at Edinburgh was only pleaded because it was deemed improper to keep the court in ignorance of that circumstance. If a fact of

¹ 20 Howell St. Tr. 478, 479.

² *Meddowcroft v. Huguenin*, 4 E. F. Moore, 386; *Perry v. Meddowcroft*, 10 Beav. 122; ante, § 753, and *Allen v. Maclellan*, there referred to. The order vacating the decree of divorce, mentioned in the last case, had been entered on application of the defendant, on whose default the divorce was originally granted; but the point stated in the text did not arise in the case, and was not discussed.

such magnitude had been suppressed, I am of opinion that any sentence pronounced by the court would have very little availed the parties,—that it would not have been finally binding, but would have been open to reëxamination,—that such suppression would, in short, have rendered the proceedings liable to impeachment. An endeavor to obtain a sentence when any such material information was withheld, would be unfair towards the court, and prejudicial to the due administration of justice.”¹ And in a New York case it was shown, that, while the husband and wife were living in Connecticut, she petitioned to the legislature of the latter State for a divorce from bed and board on the ground of his cruelty, he appeared and answered to her complaint, and, after due hearing, her prayer was allowed. Five years afterward he applied to a court in Vermont, where he was residing, for a divorce *a vinculo*, on the allegation that she had *deserted him*, suppressing the fact of the proceeding in Connecticut. Service was made on her by publication, but she had no actual notice of his suit, and did not appear. Judgment was rendered in his favor, dissolving the marriage; but the New York court held, that, as he had imposed upon the tribunal rendering it, by allegations which he knew to be false, and had concealed the real facts, the judgment was void.² It is not however sufficient to avoid a sentence, that the costs of the unsuccessful party had been agreed to be paid by the other; that some witnesses were not examined, and others not cross-examined; and that obstacles were not interposed which might have been.³

§ 763 [709]. When parties resort to the courts of a foreign State or country, without a change of domicile, for the purpose of obtaining a divorce to which they would not be

¹ Conway v. Beazley, 3 Hag. 639, 5 Eng. Ec. 242, 244, 245.

² Borden v. Fitch, 15 Johns. 121, 145. And see Allen v. Macellan, 2 Jenn. Pa. 328; Harrison v. Harrison, 19 Ala. 499; Vischer v. Vischer, 12 Barb. 640.

³ Perry v. Meddowcroft, 10 Beav. 122; Meddowcroft v. Huguatin, 3 Curt. Ec. 403, 7 Eng. Ec. 438; s. c. on Appeal, 4 E. F. Moore, 586.

entitled by the law of their own country, the divorce, as we have already seen,¹ will be treated at home as invalid. The true principle is undoubtedly, that the foreign tribunal had no proper jurisdiction over the subject-matter; being one of status, with which the courts of the parties' domicil are alone competent to deal. Yet this case is sometimes treated of as one of fraud. Thus, persons married in New York cohabited there for nearly a year, when the wife, without any change of domicil, went to Vermont for the express and sole purpose of procuring a divorce for a cause not allowed by the laws of her own State. She obtained a decree in her favor, with an allowance of alimony; and, to recover the alimony, she brought her suit in New York. It was held, that she could not prevail, the Vermont divorce being in evasion of the law of her domicil. The court add: "It may be laid down as a general principle, that, whenever an act is done in *fraudem legis*, it cannot be the basis of a suit in the courts of a country whose laws are attempted to be infringed."²

§ 764 [709 a]. It is always important to consider, between what parties, and in what manner, the question of fraud arises. This matter was somewhat discussed in a late Massachusetts case, in which the point adjudicated was, that if a husband obtains a divorce on false testimony, the wife cannot have the divorce sentence declared a nullity, on a prayer inserted in her libel for divorce against him, filed at a subsequent term.³ The truth is, there are several questions on this subject of fraud in the sentence, not yet settled on authority; and perhaps it will not be wise to pursue these speculations further here.⁴

§ 765 [710]. We have seen, that an adjudication, to have

¹ Ante, § 144-154.

² Jackson v. Jackson, 1 Johns. 424; 2 Kent Com. 108. And see Vischer v. Vischer, 12 Barb. 640; Lyon v. Lyon, 2 Gray, 367.

³ Greene v. Greene, 2 Gray, 361, 4 Am. Law Register, 42.

⁴ See an article in which several points are discussed, 4 Am. Law Register, 1; 1 Bishop Crim. Law, § 678, 679; Harrison v. Harrison, 19 Ala. 499.

the conclusive force described, must involve the direct question of the existence and validity of the matrimonial relation, or of its dissolution.¹ We have seen also, that, in every divorce suit, both the fact and legality of the marriage are directly in issue, as the foundation of the proceeding; and that the sentence of divorce, in form and effect, affirms them.² It appears therefore clearly to follow, that, after such a sentence, these questions can no more be stirred. Thus, if a party is separated from bed and board for his adultery, he cannot afterward be heard on an application to have the marriage declared null and void *ab initio*, on the score of impotence.³

§ 766 [711]. If one brings a libel for divorce, which he fails to sustain by proof, and it is dismissed on due contestation, by a final judgment not in the nature of a nonsuit, he cannot afterward maintain a second suit for the same offence.

¹ Ante, § 754.

² Ante, 262.

³ *Guest v. Shipley*, 2 Hag. Con. 321, 4 Eng. Ec. 548; Vol. I. § 116. This view is evidently sustained on principle, and it was distinctly affirmed by Lord Stowell, in the case cited of *Guest v. Shipley*. But the doctrine seems not to have been always in the minds of the judges, though I am not aware that it was ever distinctly overruled. Thus, recently, in a suit for nullity promoted by the husband, Sir J. Dodson remarked: "This case is attended with very peculiar circumstances. The marriage took place in 1826. Then a suit was promoted by the wife against the husband for a separation by reason of adultery, in which she obtained a sentence; the marriage, therefore, which is the foundation of a decree of separation, must in that suit have been established. Then in 1838 there was a suit for nullity of marriage (1 Curt. Ec. 870) promoted by the wife against the husband. The husband defended that suit, and successfully, for the marriage was not held to be void and null. The wife then had obtained a sentence of separation, but failed in her suit for annulling the marriage; and so things remained till the present suit was instituted by the husband. When the present case came before Sir H. Jenner Fust, he took the objection that the jurisdiction was not sufficiently pleaded; for the libel did not plead that the domicile of the wife was in the diocese of Canterbury," &c. So the case was disposed of without any intimation that the former proceedings would be a bar. *Williams v. Dormer*, 16 Jur. 366, 9 Eng. L. & Eq. 598, 2 Robertson, 505. Possibly some aid in this matter may be gathered from recurring to the principles stated Vol. I. § 689-692. Some of the facts in the late case of *Gaines v. Relf* seem to have furnished scope for a discussion of the doctrine stated in the text, but the point does not appear at all in the report. *Gaines v. Relf*, 12 How. U. S. 472.

He may, however, proceed for subsequent offences, or for offences which occurred during the pendency of the first suit.¹ And where a libel for divorce sets forth various acts of adultery, with persons named and persons said to be unknown, and alleges repetition of the crime between a certain day and the time of filing the libel; the libellant must be presumed to come prepared with every proof proper to be received, bearing on the subject of the complaint. And after a full hearing, followed by a decree of divorce or dismissal, the question must be taken as concluded between the parties; and a second proceeding cannot be sustained for any acts charged to have been done before the commencement of the first.²

§ 767. There is before the writer material from which he might enlarge very considerably the discussions of this chapter. But on due consideration it is deemed best to let the matter rest here.

¹ *Vance v. Vance*, 17 Maine, 203; *Griffin v. Griffin*, 8 B. Monr. 120.

² *Vance v. Vance*, *supra*.

FORMS.

§ 768. It is proposed to give in this connection a collection of forms, a part of which are copied from books, or from the files of courts, and a part of which are written by the author for use here. The origin of the particular form will be stated in each case.

§ 769. *Libel for Nullity of Marriage — General Form.*
[Original.]

To the Honorable Justices of the ——— Court, holden, &c.

The Libel of Jacob Robinson, of ———, in the County of ———, laborer,
against

Maria Richardson, falsely calling herself Maria R. Robinson, and pretending
to be the wife of said Jacob,

RESPECTFULLY REPRESENTS, That on the tenth day of November, in the year eighteen hundred and fifty-six, your libellant and the said Maria were in form of law, but not in effect, married, at ———, and that they afterward lived together as husband and wife at the said ———, until, on the fourteenth day of June, now last past, your libellant, discovering said marriage to be null and void, ceased to cohabit with said Maria. And your libellant alleges, that the cause for which said marriage is void, is the following: [here set out the cause.]

Wherefore he prays, that, by decree of this honorable court, the said pretended marriage may be pronounced to be, and to have been, at and from the time of its celebration, null and void, and that such further relief may be granted to your libellant in the premises as to right and law may pertain.

JACOB ROBINSON.

§ 770. *Libel for Divorce — General Form. Cause, Adultery.* [Original.]

To the Honorable Justices of the ——— Court, holden, &c.

The Libel of Richard Rhodes, of ———, in the County of ———, yeoman,
against
Sarah A. Rhodes, wife of said Richard,

RESPECTFULLY REPRESENTS, That the said Richard and the said Sarah were lawfully married to one another, her name being before marriage Sarah A. Franklin, on the fourth day of June, in the year eighteen hundred and forty-one, at ———, in this State, and that your libellant and the said Sarah lived together as husband and wife in various places in this State after their said marriage until, on the fourteenth day of December now last past, your libellant left the said Sarah on discovering the adulteries hereinafter to be mentioned. And your libellant says, that, on the fifth day of June, in the year eighteen hundred and fifty, the said Sarah, at ———, in the County of ———, committed adultery with one William Rochester; and on the tenth day of May, in the year eighteen hundred and fifty-one, she committed adultery with some person whose name is unknown to your libellant, at ———, in the County of ———; and that she has committed various other adulteries which your libellant cannot here particularly specify.

Wherefore he prays, that the bond of marriage between him and the said Sarah may be dissolved, and for such further and other relief as to this honorable Court may seem just.

RICHARD RHODES.

§ 771. Whether the matter of there being children of the marriage, suppose there are such, should be mentioned in the libel, and various other points, we have already discussed. In some States, perhaps in most, it is necessary there should be some allegation of the residence of the plaintiff, in the State, during a specified number of years before the bringing of the divorce suit, — a matter, also, already discussed. In Massachusetts, there can be no divorce granted where the parties have never lived together in the State, except as follows: "When," according to Gen. Stats., c. 107, § 11, "the libellant has resided in this State five consecutive years next preceding the time of filing of the libel, a divorce may be decreed for any cause allowed by law, whether it occurred in this Commonwealth or elsewhere; unless it appears that the libellant has removed into this State for the purpose of procuring a di-

voiced." Under this statute, when the allegation is not of a marriage and living together in Massachusetts, but in some other State or country, there must be an averment of residence by the libellant in the State. The following is supposed to meet the demand :

Averment of Marriage abroad and Residence of the Plaintiff in Massachusetts. [Original.]

That on the tenth day of November, in the year eighteen hundred and thirty-six, your libellant, a single woman, whose name was then Julia Randolph, was lawfully married to the respondent, at Hartford, in the State of Connecticut, and that afterward, on the fourth day of June, in the year ———, your libellant removed into Massachusetts, and from that day to the day of the filing of this libel, being more than five consecutive years next preceding said filing, she has resided and continues to reside in this State.

§ 772. *Libel for Divorce for Adultery.* The following two forms are from Oliver's Precedents, and they have been often followed in Massachusetts :

To the Honorable the Justices of the Supreme Judicial Court next to be holden at, &c., within and for the County of, &c., on, &c.

A. B. of, &c., wife of C. B. of, &c., respectfully libels and gives this honorable Court to be informed ; that she was lawfully married to the said C. B., at, &c., on, &c., and has had by him four children who are now living, viz. K. B., L. B., M. B., and N. B. ; that your libellant since their intermarriage has always behaved herself as a faithful, chaste, and affectionate wife towards the said C. D. ; but that the said C. D., wholly regardless of his marriage covenant and duty, on divers days and times since the said intermarriage, viz. on, &c., at, &c., has committed the crime of adultery with divers lewd women, viz. with one M. R., one N. R., and one R. P., all of, &c., and with divers other lewd women whose names are to your libellant unknown ; that the said C. D. and the said A. B. in her right, hold in fee-simple, real estate of the value of \$—, within this Commonwealth ; that by reason of the said marriage, the said C. D. has received personal estate to the value of \$— ; that the said C. D. is seised in fee in his own right of a valuable real estate, situate within this Commonwealth, and owns and has a large and valuable personal estate, to wit, of the value of \$—, besides the personal estate which he received by reason of said marriage ; wherefore the said libellant prays right and justice, and that she may be divorced from the bonds of matrimony, between her and her said husband ; that all the personal estate, which he received by reason of said marriage, as aforesaid, or a sum of

money equal in value to the whole of the same personal estate, may be assigned to her, for her own use, and that the custody and education of two of the said children, viz. M. B. and N. B., on account of their tender years, may be committed and intrusted to her; and as in duty bound will ever pray, &c.

§ 773. *Another; more brief.*

A. B., wife of C. D. of, &c., libels and gives this honorable Court to be informed, that on, &c., at, &c., she was lawfully married to the said C. D., and hath always behaved towards him as a chaste and faithful wife; yet the said C. D. neglecting his marriage vows and duty, since the said marriage, on, &c., at, &c., committed the crime of adultery with a certain lewd woman, to your libellant unknown. That the said C. D. has a personal estate of the value of \$—, which he received by reason of the said marriage, as well as other personal estate of the value of \$—; wherefore your libellant prays that the bonds of matrimony may be dissolved between herself and the said C. D.; that the value of said personal estate, which the said C. D. received on account of the said marriage, may be restored to her; and that such further provision should be made for her out of the estate of the said C. D. as this honorable Court may consider just, &c.

§ 774. The following three forms of bills for divorce are such as are used in Connecticut, extracted from the second edition of Swift's Digest:

Bill for a Divorce for Wilful Absence.

To the Hon. &c.

The petition of A. B., of —, humbly sheweth, that, on the — day of —, she, by the name of A. S., was lawfully married to L. B., of said —, and that she continued to live with the said L. B. in the faithful discharge of all the duties incumbent on her as the wife of the said L. B., until the — day of —, when the said L. B. deserted the petitioner, and has ever since, for more than three years, wholly neglected and refused to live with or provide for the petitioner as his wife, and has wholly neglected to discharge any of the duties incumbent on him as her husband. She therefore prays, that this honorable Court will order and decree that the petitioner be divorced from the said L. B., and declared to be sole, single, and unmarried.

Dated —.

A. B.

§ 775. *Bill for a Divorce for Adultery.*

That the petitioner, on the — day of —, was lawfully married to C. B., his present wife, by the name of S. B., and that he continued to reside with the said C. B. until the — day of —, in the faithful discharge

of all the duties incumbent upon him as her husband ; but that, on or about the said — day of —, and on divers other days and times since said marriage, the said C. B. committed adultery with G. H., of —, and on various other days and times with other men whose names are to the petitioner unknown, which acts of the said C. B. were, until recently, to the petitioner unknown ; wherefore he prays this Court, &c.

§ 776. *Bill for Divorce for Drunkenness and Intolerable Cruelty, with a Prayer for Alimony and the Custody of Children.*

That the petitioner was, on the — day of —, by the name of A. S., lawfully married to L. B., of —, and that she continued to live with the said L. B., in the faithful discharge of all the duties of the marriage relation, until on or about the — day of —, when the said L. B. became, and has ever since continued to be, grossly and habitually intemperate, and during all that time has been guilty of intolerable cruelty to the petitioner, and has repeatedly beat and bruised her, and has neglected to provide for her necessary food and clothing ; she further says, that the said L. B. is the owner in fee-simple of a lot of land, with a dwelling-house and other buildings standing thereon, situated in said —, bounded, &c., of the value of — dollars, and that he has personal property of the value of — ; she further says, that she is the mother, by the respondent, of two children, of the respective ages of two and four years, to wit, —, who, by reason of their tender ages, need her care and attention ; and that the respondent, in consequence of his intemperance, is wholly unfit to have the care and custody of said children ; she therefore prays this honorable Court to order and decree, that she be divorced from the said L. B., and declared to be sole, single, and unmarried ; that one-third part of said real and personal estate be assigned to her as her just alimony ; and that she be entitled to the care and custody of said children until they arrive at full age, or until the further order of this Court.

§ 777. *Copy of a Record, containing Libel, Sentence, &c., in an Adultery Divorce Case in Massachusetts.* [This is from a copy made by the clerk, but the names are suppressed:]

COMMONWEALTH OF MASSACHUSETTS.

ss :

At the Supreme Judicial Court of the Commonwealth of Massachusetts, begun and holden at —, within and for the County of —, on the second Tuesday of —, being the — day of said month, Anno Domini, —.

S. R., of —, in the County of —, wife of D. R., of —, in

said County, yeoman, libels and gives this Court to be informed, that her maiden name was S. W., and that by said name she was married to said D. at ———, in said County, on the fourth day of ———, in the year eighteen hundred and ———; that she lived and cohabited with her said husband at various places in this Commonwealth, until, being informed of his adultery hereinafter set forth, and in consequence thereof, she abandoned him; that the said D., at divers and many times and places since the said marriage, has committed adultery with divers and many lewd women, the names of some of whom are known to your libellant, and others are unknown; that among these instances of adultery, some seven or eight years ago, said libellant alleges on the first day of July, in the year eighteen hundred and forty-four, and at various times before and since said day, at ——— in the County of ———, he committed adultery with one A. B. That on a date unknown to said libellant, and on divers days, during the last six years, at said ———, he committed adultery with one C. D. That on the fourth day of July last past, at said ———, he committed adultery in a house of ill-fame, kept by a Mrs. P., with a lewd woman, whose name is unknown to said libellant. And that during all the time of their cohabitation he treated said libellant with great unkindness and cruelty. Wherefore said libellant prays, that said D. may be duly cited to answer to this libel, that he may be required to pay into Court for her use such sum as the Court may judge reasonable to enable her to prosecute the same, that the bonds of matrimony between her and her husband may be dissolved, that she may be invested with title to such property as is in her possession, that reasonable alimony may be decreed to her, that she may be permitted to resume her aforesaid maiden name of S. W., and for such other and further decree as to this Court may seem just. This libel was filed in the office of the Clerk of the Supreme Judicial Court on the thirtieth day of March last, and a summons was thereupon issued, directed to the Sheriff of said County of ———, or his Deputy, commanding him to summon the said D. R., to appear in this present term to answer to the libel aforesaid. And now the libellant appears and enters her said libel, and the said D. R., having been duly summoned, also appears. And the evidence in support of the libel produced, being seen and understood by the court, the material facts alleged to sustain the charge set forth in said libel are satisfactorily proved. It is therefore decreed by the court here, that the bonds of matrimony heretofore entered into between the said S. R. and the said D. R. for the causes set forth in said libel, be, and hereby are, dissolved, of which all persons interested and concerned are to take notice, and govern themselves accordingly. And it is further decreed by the court here, that the said S. R. have and hold all the personal property in her possession. And also, that she may resume her maiden name of S. W.

§ 778. *Decree for Nullity of Marriage.* [For this form the author is indebted to the Hon. Richard Fletcher, by
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whom, while a judge of the Supreme Judicial Court of Massachusetts, and for use in a cause then pending before him, it was drawn].

ss.

SUPREME JUDICIAL COURT, April Term, 1851.

W. H. M. v. M. B. P., otherwise called M. B. M.

And now the said parties appearing, the said W. H. M. by B. F. T. and S., Esqs. his attorneys and counsel, and the said M. B. P., otherwise called M. B. M. by J. C. W., her guardian *ad litem* appointed by the court; and the court here, having fully heard the said parties, and having fully heard and considered their several pleas, proofs, and allegations, doth pronounce, decree, and declare, that, on the twenty-second day of August, in the year of our Lord one thousand eight hundred and forty-seven, a pretended marriage was had and solemnized between the said W. H. M. and the said M. B. P., otherwise called M. B. M., but that at the time of the solemnization of the said pretended marriage, she, the said M. B. P., otherwise called M. B. M., was an insane person and incapable of making such a contract.

Therefore, upon the reason above mentioned, the said court here doth hereby pronounce, decree, and declare, that the said pretended marriage so had and solemnized between the said W. H. M. and the said M. B. P., otherwise called M. B. M., was and is, wholly and absolutely, null and void, to all intents and purposes whatsoever. And the said court here doth hereby further pronounce, decree, and declare, that the said W. H. M. was and is free from all bond of marriage with the said M. B. P., otherwise called M. B. M.

[For another form, employed in a case of fraud and duress, see Vol. I. § 213].

§ 779. *Decree affirming the Decree of the Court below, divorcing Parties from the Bond of Matrimony.* [From Hackney v. Hackney, 9 Humph. Tenn. 450].

This cause was heard on the 25th of January, 1849, before the judges of the Supreme Court, upon the record and proceedings had in the same in the Chancery Court at Columbia, and upon argument of counsel on both sides, and this court being of opinion that there is no error in the decree below, orders the same to be in all things affirmed. And the court being satisfied that the defendant has been guilty of acts of inhuman cruelty and neglect towards complainant, which makes it unsafe and improper for her longer to cohabit with him, or to be under his dominion and control, it is

therefore ordered, adjudged, and decreed, that the bonds of matrimony existing between them be dissolved, annulled, and for nought held, and that complainant be restored to all the rights of a *feme sole*. And it further appearing, that at the time of the marriage the complainant was the owner of a valuable real and personal property, which passed into defendant's possession upon the marriage; and the court being of opinion, that her said real estate, and so much of her personal, and its increase, as remains in specie, ought to be restored to her as a suitable and reasonable provision for her; it is therefore ordered, adjudged, and decreed, that all the right, title, and interest of defendant in and to any and all of said real and personal property, be divested out of defendant and vested in Barclay Martin and David D. McFall, to be by them or the survivor of them held for the sole and separate use of complainant, with full power by her to dispose of the same as she may think proper, and that the sheriff of Maury be directed forthwith to put her in possession of all of said property ascertained to remain in specie by the decree pronounced in this cause by the Chancellor at Columbia; and also to put her in possession of the real estate. It is further ordered, that defendant pay the costs of the Chancery Court and of this court, and that execution issue for the same against him and his securities in the appeal.

§ 780. *Decree of Divorce from Bed and Board.* [From *Barrere v. Barrere*, 4 Johns. Ch. 187].

It appearing from the pleadings and proofs, that the defendant has been guilty of cruel and inhuman treatment of the plaintiff, by repeated acts of personal violence, so as to render it unsafe and improper, under existing circumstances, for her to cohabit with him, or to be under his dominion and control, it is thereupon ordered &c., that the plaintiff and defendant be separated from bed and board forever; provided, however, that the parties may, at any time hereafter, by their joint and mutually free voluntary act, apply to the court for leave to be discharged from this decretal order. And it is hereby declared to be the duty of each of them to live chastely during their separation, and that it will be criminal, and an act void in law, for either of them during the life of the other to contract matrimony with any other person. And it is further ordered &c., that the plaintiff, according to the prayer of her bill, be entitled to, and charged with, the custody, care, and education of the infant son of the parties in the pleadings mentioned; provided always, that this order for the custody, care, and education of the said infant, may, at any time hereafter, be modified, varied, or annulled, upon sufficient cause shown. And it is further ordered &c., that the defendant pay to the plaintiff 200 dollars a year, to be computed from the date of this decree, in half-yearly payments, to be applied towards the support and maintenance of the plaintiff and her son, and that this allowance is to con-

tinue until further order, and be subject to variation, as future circumstances may require. And it is further *ordered*, that the defendant pay to the plaintiff the costs of this suit, to be taxed, and that she have execution therefor, according to the course and practice of the court.

§ 781. *Decree for Permanent Alimony and for the Custody and support of the Children.* [From *Richmond v. Richmond*, 1 Green, Ch. (N. J.) 90. Says the report: "On the 13th of October, 1837, the court divorced the parties, *a vinculo matrimonii*, for the cause of adultery in the defendant, and placed the children under the care and management of the complainant. By that decree, a reference was made to a master to inquire into the circumstances and condition of the said parties, and the circumstances and condition of the said children, and into all the matters touching the amount to be allowed the complainant for alimony, and for the support, clothing, and education of the children." Upon the coming in of the master's report there was a hearing before the court, which resulted in the following decree :]

It is ordered, adjudged, and decreed, that the defendant, Walter M. Richmond, pay to the complainant, Jane Richmond, or to her order, during her natural life, or until the future order of this court to the contrary, the annual sum of two hundred and fifty dollars, payable half-yearly; that is to say, the sum of one hundred and twenty-five dollars on the thirtieth day of October, and one hundred and twenty-five dollars on the thirtieth day of April, in each and every year, commencing with the day of the date hereof; the same being considered and deemed a suitable allowance, having regard to the circumstances of the parties respectively, for her support and maintenance, and that the defendant, Walter M. Richmond, do within thirty days after service upon him or his solicitor of a copy of this decree, give such reasonable security for the payment of said annual sum of two hundred and fifty dollars, as shall be approved of by George P. Molleson, esquire, one of the masters of this court, for the punctual payment of said sum, at the times above specified; and upon his neglect or refusal to give such reasonable security as shall be required by said master, within the time so specified, or upon his default, and that of his surety, in case such surety shall be given, to pay such annual sum at the times when by this decree the same may fall due, as above mentioned, that the complainant be at liberty to apply to this court to award and issue process for the immediate sequestration of the defendant's personal estate, and the rents and profits of his real estate, and to appoint a receiver thereof, according to the statute in such case made and provided,

or such other process as this court may, under the circumstances, deem equitable and just, and may be consistent with the power and authority of the court.

And it is further ordered, adjudged, and decreed, that the former order of this court, touching a monthly allowance to the said complainant for her own support and that of her children, be deemed to have ceased as to any further allowance from and after the date of this decree.

And it is further ordered, adjudged, and decreed, by the said chancellor, pursuant to the power and authority vested in this court, and to the statute in such case made and provided, that the said defendant, Walter M. Richmond, pay to the said complainant, Jane Richmond, or her order, until the future order of this court to the contrary, the further annual sum of three hundred and ninety dollars, payable half-yearly, that is to say, the sum of one hundred and ninety-five dollars on the thirtieth day of October, and the sum of one hundred and ninety-five dollars on the thirtieth day of April, in each and every year, commencing with the day of the date hereof, the same being deemed a fit and just allowance for the care and maintenance, education and clothing, of her said children, having like regard to the circumstances and condition of the said defendant, and the age and condition of the said children, and for the support, education, clothing, and maintenance of said children. And that the said defendant give such further reasonable security as shall in like manner be approved of by the said George P. Molleson, esquire, master as aforesaid, for the punctual payment of the said last-mentioned annual sum of three hundred and ninety dollars at the times above specified, which security shall be given within thirty days after the service of a copy of this decree on said defendant or his solicitor. And on his neglect or refusal to give such reasonable security as shall be required of him by the said master, within the time so limited, or upon default of said defendant and his surety to pay the said last-mentioned annual sum, at the times and in the manner last above mentioned, that the said complainant be at liberty in like manner to apply to this court to award and issue process for the immediate sequestration of the property and estate of said defendant, to enforce such payment, or for such other process as may by said court be deemed proper, and shall be consistent with the power and authority of this court.

And it is further ordered, adjudged, and decreed, that this decree shall, from the date thereof, be a lien upon the personal and real estate of said defendant in the State of New Jersey, and that a copy thereof be forthwith served upon said defendant or his solicitor; and that either party be at liberty to apply, upon a future change of circumstances in the parties, or either of them, for such variation or modification of this order and decree, touching the said allowance for alimony and maintenance, and for the support, education, care and clothing of said children; as such future circumstances may dictate to be just and equitable.

And it is further ordered, adjudged, and decreed, that the said defendant

pay to the said complainant all her costs which have accrued in the prosecution of this suit, to be taxed by the clerk of this court, and that the said complainant have execution therefor, according to the course and practice of this court; and also, that the said complainant be at liberty to apply to this court for any further order and direction that may be necessary and proper, to carry into full effect this decree.

§ 782. ENGLISH FORMS. The following forms, adopted by the English Matrimonial Court, will be suggestive; and, with such alterations as the practitioner will know how to make, they may be used with us:

I. Petition for Divorce.

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

The day of , 18 .

The Petition of A. B., of , sheweth:

1. That your Petitioner was on the day of , 18 , lawfully married to C. B., then C. Z., widow, at .

2. That after his said marriage your Petitioner lived and cohabited with his said wife at and at , and that your Petitioner and his said wife have had issue of their said marriage three children, to wit, one son and two daughters.

3. That on the day of , 18 , and other days between that day and , the said C. B. at in the county of , committed adultery with R. S.

4. That in and during the months of January, February, and March, 186 , the said C. B. frequently visited the said R. S. at , and on divers of such occasions committed adultery with the said R. S.

Your Petitioner therefore humbly prays, that your Lordship will be pleased to decree:

[*Here set out the relief sought.*]

And that your Petitioner may have such further and other relief in the premises as to your Lordship may seem meet.

And your Petitioner will ever pray, &c.

§ 783. II. *Form of Answer.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

The day of , 18 .

A. B. v. C. B.

The Respondent, C. B., by P. A., her proctor, [solicitor, or attorney, or in person], saith:

1. That she denies that she committed adultery with R. S., as set forth in the said petition.

2. Respondent further saith, that on the day of , 18 , and on other days between that day and , the said A. B., at in the county of , committed adultery with X. Y.

[In like manner Respondent is to state connivance, condonation, or other matters relied on as a ground for dismissing the Petition.]

Wherefore this Respondent humbly prays, that your Lordship will be pleased to reject the prayer of the said petition, and decree, &c.

And this Respondent will ever pray, &c.

§ 784. III. *Form of Record.*

In Her Majesty's Court for Divorce and Matrimonial Causes.

The day of , 18 .

A. B. v. C. B.

A. B. did, in his petition presented in this cause, allege that C. B. did, to wit, on the day of , 18 , commit adultery with R. S.

[Here insert the allegations of the Petition.]

C. B. did, in answer thereto, deny *[insert the denial and any other necessary matters contained in the answer]*. Whereupon the said A. B. denied that *[here insert the substance of the Replication, if any, and so on for the further statements, if any]*.

Therefore let a jury come.

§ 785. IV. *Petition for Alimony.*

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

C. B. v. A. B.

The day of , 18 .

The petition of C. B., the lawful wife of A. B., sheweth :

1. That the said A. B. has for many years carried on the business of at , and from such business derives the net annual income of £ .

2. That the said A. B. holds shares of the Railway Company, amounting in value to £ , and yielding a clear annual dividend to him of £ .

3. That the said A. B. is possessed of stock in trade in his said business of , to the value of £ .

[And so on for any other facilities which the husband may possess.]

Your Petitioner therefore humbly prays, that your Lordship will be pleased to decree her such sum or sums of money by way of ali-

mony pendente lite [*or permanent alimony*] as to your Lordship shall seem meet.
And your Petitioner will ever pray, &c.

§ 786. *V. Petition for Reversal of Decree.*

To the Judge Ordinary of Her Majesty's Court for Divorce and Matrimonial Causes.

The day of , 18 .
The Petition of A. B., of .

Sheweth,

1. That your Petitioner was, on the day of , lawfully married to

2. That on the day of , your Lordship, at the petition of , pronounced a decree affecting this Petitioner, to the effect following, to wit.

[*Here set out the Decree.*]

3. That such decree was obtained in the absence of your Petitioner, who was then residing at

[*State facts tending to show, that the Petitioner did not know of the proceedings ; and further, that, had he known, he might have offered a sufficient defence.*]

or,

That there was reasonable ground for your Petitioner leaving his said wife, for that his said wife

[*Here state any legal grounds justifying the Petitioner's separation from his wife.*]

Your Petitioner therefore humbly prays, that your Lordship will be pleased to reverse the said decree.

And your Petitioner will ever pray, &c.

§ 787. The reader may, for forms, refer also to the following cases :

Bill, Demurrer, Answer, &c. McDermott's Appeal, 8 Watts & S. 251.

Sentence of Nullity by Reason of a Former subsisting Marriage. Fielding's case, 14 Howell St. Tr. 1327, 1369.

Decree of Divorce from the Bond of Matrimony for Adultery and Cruelty. McCaulley v. McCaulley, 1 Harring. Del. 137.

Decree of Divorce from Bed and Board for Cruelty. Tayman v. Tayman, 2 Md. Ch. 393.

Decree for Alimony. Hewitt v. Hewitt, 1 Bland, 101.

§ 788. *Answers.* The English form of answer, ante, § 783, can be easily adapted to American use. Our books do not contain any desirable form of the answer, and the author does not deem it necessary to draw one. In *Jeans v. Jeans*, 2 Harring. Del. 38, is the following plea to a petition for divorce :

And the said Abel Jeans, by, &c., comes and defends, &c., and says *actio non*, &c., because he says, that the said Priscilla Jeans, after the said supposed transgressions in the said petition alleged, she the said Priscilla has admitted the said Abel Jeans, the respondent, into conjugal society or embraces, after she the said Priscilla knew of the said acts of adultery. Wherefore the said Abel Jeans prays judgment, &c., whether the said Priscilla ought to have and maintain her suit aforesaid, thereof against him, &c.

In *Orrok v. Orrok*, 1 Mass. 341, we have the following :

And the said Alexander Orrok comes and defends, &c., when, &c., and says the allegations, matters, and things in the libel contained are false and groundless, and that there is not any cause of divorce as prayed for; and thereof he puts himself on trial, &c.

In *Pastoret v. Pastoret*, 6 Mass. 276, are the following :

The respondent in his plea, protesting against the truth of the several allegations contained in the libel, says, that the said Mary hath, at divers times before the filing of her said libel, committed the crime of adultery with one M. Luyo, and with divers other persons, and therefore he prays that the prayer thereof may not be granted.

And the libellant, for replication, says, that all the allegations contained in said libel are true, and that by reason of any thing above in the answer of the said John contained, she ought not to be precluded from having the prayer of her said libel granted; because she says, that all the several allegations in the said answer contained are false and groundless, and that she is in no wise guilty in manner and form as the said John in his said answer hath alleged; and this she prays may be inquired of by the court.

And the said John likewise.

§ 789. The author is aware, how incomplete are these forms, and how inadequate they are to meet many of the exigencies of practice. But this book is intended for use in all the States, and it is impossible, seeing the practice in the several States differs, that any general collection should be

more than suggestive—it could not be complete, unless a set of forms were made for each State. A few particular allegations will be added as follows:

1. *Adultery alleged in Recrimination.* That the complainant, on divers days during the months of June, July, August, September, and October, during the years 1844, 1845, 1846, and between the first day of June and the first day of November in the years aforesaid, at Fort Lee, Bull's Ferry, and Wehawken, in the State of New Jersey, did repeatedly commit adultery with some female to defendant unknown; and more particularly, that the said complainant did, during the year 1846, commit adultery with the said female at a hotel at Fort Lee aforesaid. [Held sufficient by Edwards, J., in *Morrell v. Morrell*, 1 Barb. 318.]

2. *Desertion.* That the defendant, on the tenth day of August, in the year eighteen hundred and fifty-two, deserted the plaintiff, and from said day to the day of the filing of this libel hath continued so to desert the plaintiff, for the space of four years and more next preceding the said filing. [Original. But the pleader, in drawing the libel for desertion, will follow the terms of the statute. This form will not be found universally sufficient.]

3. *Impotence.* That the said Roxana, at the time of her pretended marriage with the plaintiff, and ever since, had and hath a narrowness of the vagina not admitting of penetration by man, and also that she was and is destitute of the uterus, and incapable of being carnally known by man or of becoming a mother, and that these her said defects are incurable. [Original.]

4. *Impotence*,—another form. That the said John was at the time of his said pretended marriage with the libellant, and ever since has been, and is, destitute of testicles, and without ability to erect the penis, and that by reason of these his defects he is and ever since his pretended marriage has been incapable of knowing women carnally, and that his said defects are incurable. [Original. These two forms are adapted to cases in which there is no triennial cohabitation, and where, therefore, some particular visible defect must be alleged. See ante, § 585. For the other class of cases, see ante, § 578, &c.]

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